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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-696

NORA LEWIS, *et al.*,

Petitioners,

v.

PHILIP MORRIS, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

PHILIP MORRIS, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Nora Lewis, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 10, 1978.

Opinions Below

The July 7, 1976, opinion of the district court is reported at 419 F.Supp. 345 and is set out in the Appendix hereto, pp. 1a-38a. The order of the district court of September 2, 1976, which is not officially reported, is reprinted at 13 EPD ¶ 11,350, and is set out in the Appendix hereto, pp. 39a-54a. The order of the district court of November 17, 1976, which is not officially reported, is set out in the Appendix hereto, pp. 55a-56a. The May 10, 1978, opinion of the court of appeals is reported at 577 F.2d 1135, and is set out in the

Appendix hereto, pp. 57a-96a. The July 26, 1978, order of the court of appeals denying rehearing and rehearing en banc, which is not officially reported, is set out in the Appendix hereto, p. 95a.

Jurisdiction

The judgment of the court of appeals was entered on May 10, 1978. Petitioners filed a timely Petition for Rehearing and Rehearing En Banc, which was denied on July 26, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the filing of an interlocutory appeal[1] under 28 U.S.C. § 1292(a)(1) divest a district court of jurisdiction over part or all of the action involved?

2. Did the court of appeals err in directing the dismissal of plaintiffs' claim of unlawful racial discrimination in employment, where both courts below found there was an unrebutted prima facie case of discrimination and the record showed, *inter alia*, that from 1965 to 1971 the defendant company had assigned newly hired workers among its departments in the following manner:

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[1] Petitioners maintained below that the order which was the subject of the attempted interlocutory appeal in this case did not grant injunctive relief, but merely described what the district judge intended to include in any subsequent injunction. We therefore urged below that the interlocutory appeal was improper, and would so urge in this Court were certiorari granted. See App. 63a. This question presented is intended to comprise whether an improper interlocutory appeal would affect the district court's jurisdiction, as well as whether or not the instant interlocutory appeal was proper.

	Fabrication	*Ware-house*	*Pre-Fabrication*	*Stemmery*	*Total*
White Employees	75% (3602)	7% (313)	5% (251)	13% (624)	100% (4793)
Black Employees	30% (1052)	1% (40)	8% (287)	61% (2133)	100% (3512)

Statutory Provisions Involved

Section 703 of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 1292(a), 28 U.S.C., provides in pertinent part:

> (a) The court of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the

Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Statement of the Case

Five black female employees brought this action on September 9, 1973, in the United States District Court for the Eastern District of Virginia, alleging that they were the victims of discrimination in employment on the basis of race and sex by Philip Morris, Incorporated, the Tobacco Workers' International Union, and its Local 203. Plaintiffs alleged that the discrimination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, 42 U.S.C. § 1981, and 29 U.S.C. § 151. Jurisdiction was asserted, *inter alia,* under 28 U.S.C. § 1343(3).

The district court certified the case as a class action on October 7, 1974, and defined the class to include all blacks and women who had been employed in the company's stemmery on or after July 2, 1965, the effective date of Title VII. Certain issues were resolved by a consent decree entered on June 6, 1975.

The case was tried in April of 1975. Plaintiffs offered evidence of a number of different discriminatory practices, the most important of which was an alleged practice of assigning most newly hired blacks to two traditionally black departments in its Richmond operations, pre-fabrication and the stemmery, assigning most newly hired whites to two traditionally white departments, fabrication and warehouse, and excluding newly hired female employees from the pre-fabrication and warehouse departments. On July 7, 1976, the district court entered a Memorandum Opinion and

Order holding the company and both unions liable for discrimination on the basis of race and sex. App. 1a-38a. The parties were directed to file briefs on the appropriate method of framing and implementing relief. App. 38a.

On September 2, 1976, the district court entered an order "adopting plaintiffs' back pay and injunctive relief guidelines." App. 39a-57a. These Guidelines had been proposed by plaintiffs to set standards for identifying victims of discrimination, for calculating back pay, and for framing a detailed injunctive decree. The court's order provided that "[a]ll Stage II [remedy] proceedings shall be governed by and consistent with these guidelines." App. 40a.

On September 14, 1976, the defendant unions moved for reconsideration of the Guidelines, a request that was later joined in by the company. On September 29, 1976, while the motion for reconsideration was still pending, the defendants, apparently concerned that the Guidelines themselves constituted an injunction and that the 30 days for an interlocutory appeal were about to end, filed a notice of appeal. On November 17, 1976, the district court granted the motion for reconsideration and vacated its previous order adopting the Guidelines. App. 55a.

In the court of appeals, however, the company and unions contended that the district court lost jurisdiction to grant their pending motion for reconsideration when they filed their notice of appeal pursuant to 28 U.S.C. § 1292(a)(1). The court of appeals on May 10, 1978, held that the district court did lack jurisdiction to vacate its September 2, 1976, order, that the Guidelines were thus still in effect, and that the Guidelines contained provisions which were injunctions appealable under § 1292(a)(1). App. 63a-69a. The court of appeals therefore proceeded to reach the merits of the appeal; it reversed the finding of racial discrimination,

directed that that claim be dismissed, and vacated and remanded the finding of discrimination on the basis of sex. App. 72a-96a. The court of appeals noted that the defendants had asserted unsuccessfully in the district court that certain aspects of this case were foreclosed as *res judicata*, but did not reach that issue itself. App. 70a-72a.

On June 5, 1978,[2] petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. The court of appeals denied that Petition on July 26, 1978.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Resolve a Conflict Among the Circuits Regarding the Effect of an Interlocutory Appeal on the Jurisdiction of a District Court.

Although 42 U.S.C. § 1292(a)(1) authorizes interlocutory appeals from any order granting or denying an injunction, it does not expressly indicate the effect, if any, of such an interlocutory appeal on the continued jurisdiction of the district court which granted or denied that injunction. The effect of such an appeal on the jurisdiction of the district courts is a matter of substantial importance, since a substantial number of appeals are taken each year under section 1292(a)(1).[3]

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[2] On May 19, 1978, the court of appeals extended the time for filing a Petition for rehearing.

[3] The Administrative Office of the United States Courts does not collect statistics on these appeals. An informal survey of recently published appellate decisions indicates that the number of § 1292(a)(1) appeals each year is in the order of magnitude of 100.

A serious conflict exists among the circuits on this issue. The Sixth,[4] Seventh,[5] Eighth,[6] and District of Columbia[7] circuits have held that the taking of such an interlocutory appeal in no way affects the jurisdiction of the district court. The Ninth Circuit rule is that the district court loses jurisdiction as to the matter involved in the appeal, but may modify the order appealed from or take other action based on new developments.[8] The Fifth[9] Circuit has con-

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[4] *Jago* v. *United States District Court*, 570 F.2d 618, 622-23 (6th Cir. 1978); *Foote* v. *Parsons Non-Skid Co.*, 196 F. 951, 954 (6th Cir. 1912).

[5] *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *aff'g* 411 F. Supp. 218, 246-47 (N.D. Ill. 1976); *United States* v. *City of Chicago*, 534 F.2d 708, 711 (7th Cir. 1976); *Chicago Housing Tenants Organization* v. *Chicago Housing Authority*, 512 F.2d 19, 22 (7th Cir. 1975); *United States* v. *Board of School Commissioners of Indianapolis*, 503 F.2d 68, 81-82 (7th Cir. 1974); *Dempsey* v. *Guaranty Trust Co.*, 131 F.2d 103, 105 (7th Cir. 1942).

[6] *Janousek* v. *Doyle*, 313 F.2d 916, 920-22 (8th Cir. 1963); *United States* v. *Onan*, 190 F.2d 1, 8 (8th Cir. 1951); *Western Electric Co.* v. *Cinema Supplies, Inc.*, 80 F.2d 111, 112 (8th Cir. 1935); *cf. Control Data Corp.* v. *International Business Machine Corp.*, 421 F.2d 323, 325 (8th Cir. 1970) (an interlocutory appeal pending under 28 U.S.C. § 1292(b) when the district court dismissed part of the complaint). *Janousek* is the leading appellate case on this issue.

[7] *Society For Animal Rights, Inc.* v. *Schlesinger*, 512 F.2d 915, 918 (D.C. Cir. 1975).

[8] *Hoffman, etc.* v. *Beer Drivers & Salesmen's etc.*, 536 F.2d 1268, 1276 (9th Cir. 1976); *DePinto* v. *Provident Security Life Insurance Co.*, 374 F.2d 50, 51, n.2 (9th Cir. 1967); *Phelan* v. *Taitano*, 233 F.2d 117, 119 (9th Cir. 1956); *In re Woodruff*, 121 F.2d 152, 153-54 (9th Cir. 1941).

[9] This is the position taken in the most recent Fifth Circuit decision. *Zimmer* v. *McKeithen*, 467 F.2d 1381, 1382 (5th Cir. 1972) *rev'd* 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish* v. *Marshall*, 424 U.S. 636 (1976); see also *Turner* v. *HMH Publishing Co.*, 328 F.2d 136, 137 (5th Cir. 1964). *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1003, n.8 (5th Cir. 1969) held more broadly that jurisdiction was lost over "those matters involved in the appeal." But earlier Fifth Circuit opinions had followed the majority view that

lude[d] that such an appeal divests the district court of jurisdiction t[o] modify or vacate the order being appealed, except to stay its operation pending appeal. The Tenth Circuit[10] has adopted a more restrictive rule, which divests the district court of *all* jurisdiction over the case during the pendency of the interlocutory appeal. The Second Circuit is divided on this question; since 1961 panels of that circuit have held that the district court loses jurisdiction to modify the order being appealed,[11] does not lose such jurisdiction,[12] may modify the order if it thinks it incorrect but not based on new evidence,[13] and may moot the interlocutory appeal by trying the case on the merits and entering a final injunction.[14] The Fourth Circuit decision in the instant case holds that the district court lost jurisdiction to vacate its order of September 2, 1976, once that order was made the subject

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the district court's jurisdiction is not affected by the pendency of an interlocutory appeal. *Plaquemines Parish Commission Council* v. *United States*, 416 F.2d 952, 954 (5th Cir. 1969); *Hamer* v. *Campbell*, 358 F.2d 215, 223 (5th Cir. 1966); *Nalco Chemical Co.* v. *Hall*, 347 F.2d 90, 92 (5th Cir. 1965); *Stell* v. *Savannah-Chatham County Board of Ed.*, 333 F.2d 55, 60 (5th Cir. 1964) (approves district court order "which involves the same question" as that on appeal); see also *United States* v. *Lynd*, 321 F.2d 26, 28, n.1 (5th Cir. 1963).

[10] *Petuskey* v. *Rampton*, 431 F.2d 378, 381 (10th Cir. 1970), relying on *Aune* v. *Rynders*, 344 F.2d 835, 841 (10th Cir. 1965). *Aune*, a bankruptcy decision, appears to be inconsistent with an earlier Tenth Circuit decision in *Fernow* v. *Liberty Royalties Corp.*, 146 F.2d 396, 397 (10th Cir. 1944).

[11] *Morning Telegraph* v. *Powers*, 450 F.2d 97, 99 (2d Cir. 1971); *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962).

[12] *Ferguson* v. *Tabah*, 288 F.2d 665, 675 (2d Cir. 1961).

[13] *State of New York* v. *Nuclear Reg. Com'n*, 550 F.2d 745, 758-59, n.7 (2d Cir. 1977).

[14] *Ruby* v. *Pan American World Airways, Inc.*, 360 F.2d 690, 691-92 (2d Cir. 1966); see also *S.E.C.* v. *Okin*, 137 F.2d 862, 863 (2d Cir. 1943).

of a section 1292(a)(1) appeal, App. 65a-67a; whether the Fourth Circuit has adopted the broad prohibition of the Tenth Circuit, or only the rule of the Fifth Circuit and some Second Circuit panels barring modification of the order appealed from, is unclear.

The numerous district court decisions on this issue are similarly divided. Nine opinions hold that the jurisdiction of a district court is not affected by the pendency of an interlocutory appeal.[15] Two decisions adopt the Fifth and Second Circuits' "same order" rule.[16] Five courts follow the Ninth Circuit rule regarding "matters involved in the appeal,"[17] but the district courts are in disagreement as to the meaning of the standard.[18] The opinions of these district courts bear no consistent relation to the appellate decisions

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[15] *Human Resources Management* v. *Weaver*, 422 F. Supp. 241 (D.D.C. 1978); *Carpenter Brothers, Inc.* v. *Duval Sales Corp.*, 440 F. Supp. 1150, 1151 (E.D. Wis. 1977); *Macon* v. *Bailar*, 428 F. Supp. 182, 183-87 (E.D. Va. 1977); *United States* v. *City of Chicago*, 411 F. Supp. 218, 247 (N.D. Ill. 1976), *aff'd* 549 F.2d 415 (7th Cir. 1977); *A.O. Smith Corp.* v. *F.T.C.*, 396 F. Supp. 1125, 1137-38, n. 8 (D. Del. 1975); *District 2, Marine Engineers* v. *Falcon Carriers*, 374 F. Supp. 1342, 1345 (S.D.N.Y. 1974); *SCRAP* v. *United States*, 353 F. Supp. 317, 320, n.2 (D.D.C. 1973), *rev'd on other grounds* 412 U.S. 669 (1973); *L.A. Concrete Pumping* v. *Majich*, 18 Fed. Rules Serv. 2d 45, 47-48 (C.D. Cal. 1973); *O'Brien* v. *Avco Corp.*, 309 F. Supp. 703, 705 (S.D.N.Y. 1969).

[16] *Smith* v. *American Shipbuilding*, 22 Fed. Rules Serv. 2d 538, 539 (N.D. Ohio 1976); *Environmental Defense Fund, Inc.* v. *Froehlke*, 348 F. Supp. 338, 366 (W.D. Mo. 1972).

[17] *United States* v. *Articles of Food and Drug*, 444 F. Supp. 266, 275 (E.D. Wisc. 1978); *E.E.O.C.* v. *Locals 14 and 15, I.U.O.E.*, 438 F. Supp. 876, 880 (S.D.N.Y. 1977); *Armstrong* v. *O'Connell*, 416 F. Supp. 1325, 1329 (E.D. Wis. 1976); *Van Hoomissen* v. *Xerox Corp.*, 368 F. Supp. 829, 831, n. 1 (N.D. Cal. 1973); *Babcock & Wilcox Co.* v. *Foster Wheeler Corp.*, 54 F.R.D. 474, 476 (D.N.J. 1971).

[18] *Compare Armstrong* v. *O'Connell*, *supra*, n. 17, *with United States* v. *Articles of Food and Drug*, *supra*, n. 17.

in the circuits where they are located.[19] Leading commentators are also divided on this issue.[20]

Although this issue arises under varying circumstances, the conflict exists even when those differences are taken into account. The instant decision, the Fifth Circuit,[21] and two panels of the Second Circuit,[22] squarely hold a district court cannot modify an order which is the subject of a pending interlocutory appeal; such modifications have been expressly upheld by decisions in the Seventh,[23] Eighth,[24] and Ninth[25] circuits. If such a modification is sought, the Second Circuit holds that new evidence may not be considered[26] but

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[19] District courts have adopted the "matter involved in the appeal" rule in the Second and Seventh Circuits, although the appellate decisions in those circuits approve different standards. None of the district court decisions in New York rely on Second Circuit decisions; although the conflicting decisions of that circuit take a generally restrictive view of the scope of district court jurisdiction, *District 2, Marine Engineers* and *O'Brien* rely on more liberal Eighth and Ninth Circuit decisions in holding their jurisdiction is not affected by the pendency of an interlocutory appeal.

[20] The most detailed discussion is in C. Wright, et al., Federal Practice and Procedure, v. 16, § 3921, pp. 25-28. Professor Wright expressly disapproves the "same order" rule. *Id.*, p. 28. See also Barron and Holtzoff, Federal Practice and Procedure, v. 3A, 1971 Pocket Part, § 1558, p. 33. Professor Moore apparently suggests the "same order" rule in the text of 9 Moore, Federal Practice, ¶ 203.11, p. 738, but suggests in the 1977-78 Supplement use of the "matter involved in the appeal" standard. This may be based, however, on Moore's approval of the now discredited appellate leave procedure. 7 Moore, Federal Practice, ¶ 60.30[2], p. 429, n. 27.

[21] See note 9, *supra*.

[22] See note 11, *supra*.

[23] *Dempsey* v. *Guaranty Trust Co.*, *supra* n. 5.

[24] *Western Electric Co.* v. *Cinema Supplies*, *supra* n. 6.

[25] *Hoffman, etc.* v. *Beer Drivers and Salesmen's etc.*, *supra* n. 8; see also *Jago* v. *United States District Court*, *supra* n. 4.

[26] *Ideal Toy Corp.* v. *Sayco Doll Corp.*, *supra* n. 11; *State of New York* v. *Nuclear Reg. Com'n*, *supra* n. 13.

the Ninth Circuit holds that it may.[27] If, while a preliminary injunction is awaiting review in the court of appeals, the district court conducts a trial on the merits and enters a permanent injunction, the Tenth Circuit will overturn the permanent injunction on the ground the district court lacked jurisdiction to enter it,[28] but the Second Circuit will dismiss as moot the appeal of the preliminary injunction and consider only the appeal of the permanent injunction.[29] If, after a district court has granted or denied an injunction, a party moves for reconsideration but then appeals before the motion is ruled on, a district court can decide the motion in the Second Circuit[30] but not in the Fourth or Fifth.[31]

These conflicts reflect disagreement among the lower courts as to the meaning and vitality of decisions of this Court. Most of the lower court opinions holding that district court jurisdiction is unaffected by the pendency of an interlocutory appeal rely on this Court's decision in *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156 (1906). *National Enameling* held, with regard to the statute authorizing interlocutory appeals:

> Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered. 201 U.S. at 162.

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[27] *Hoffman, etc.* v. *Beer Drivers & Salesmen's etc.*, *supra* n. 8.

[28] *Petuskey* v. *Rampton*, *supra* n. 10.

[29] *Ruby* v. *Pan American Airways, Inc.*, *supra* n. 14; *S.E.C.* v. *Okin*, *supra* n. 14.

[30] See *Hawkins* v. *Lindsley*, 327 F.2d 356, 359 (2d Cir. 1964).

[31] *Turner* v. *HMH Publishing Co.*, *supra* note 9.

Consistent with this view, this Court has repeatedly held that a district court may enter a final injunction during the pendency of an interlocutory appeal from a preliminary injunction, and that if it does so the interlocutory appeal will be dismissed.[32]

The Fourth Circuit in this case, however, concluded that a different rule was established by *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). In that case the district court had entered on August 2, 1971, a final injunction fully disposing of the case, and an appeal was duly taken; seven months later, while that appeal was still pending, the district court, on the motion of one of the parties, vacated its order of August 2, 1971 and entered a different injunction. The Fifth Circuit held the district court was "without jurisdiction" to enter the new order.[33] In this Court the district court's authority to enter the second injunction was briefed,[34] but the Court did not have to reach that issue since it concluded that the original injunction violated clearly established constitutional principles. 424 U.S. at 639. The Court's opinion explained in a footnote the procedural history of the case:

> During pendency of the appeal in the court below, the District Court purported to withdraw its order approving the at-large plan and to substitute in its stead a complex redistricting plan submitted by intervenor Marshall. The Court of Appeals vacated the order on the ground that when the appeal was filed,

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[32] *Sterling* v. *Constantin,* 287 U.S. 378, 386 (1932); *Champlin Ref. Co.* v. *Corporation Commission,* 286 U.S. 210, 224 (1932); *Smith* v. *Illinois Bell Telephone Co.,* 270 U.S. 587, 589 (1926); *Pacific Telephone and Telegraph Co.* v. *Kuykendall,* 265 U.S. 196, 205 (1924); *Shaffer* v. *Carter,* 252 U.S. 37, 44 (1920).

[33] *Zimmer* v. *McKeithen,* 467 F.2d 1381, 1382 (5th Cir. 1972).

[34] Brief for Respondent, No. 73-861, pp. 27-30

> the District Court lost jurisdiction over the case. 424 U.S. at 638, n.4.

The Fourth Circuit in the instant case held that this footnote approved the action of the Fifth Circuit and was intended to "at least tacitly acknowledg[e] that a district court loses jurisdiction to amend or vacate its order after the notice of appeal had been filed. . . ." App. 66a.

We submit that the issue in *East Carroll* was whether a district court can modify a *final* judgment when it is pending on appeal, and that even that issue was not there decided by this Court. Any decision that a district court could not modify an injunction that was pending on appeal would be inconsistent with this Court's decision, seven months after *East Carroll,* in *Standard Oil Company* v. *United States,* 429 U.S. 17 (1976). *Standard Oil* held that, even where a case had been decided on appeal, the district court had the authority to modify on the ground of "possible later events" the judgment directed by the mandate of the appellate court. 429 U.S. at 18-19. Certainly the district court should have the same authority to modify its own orders prior to an appellate decision; the contrary rule would require a court of appeals to pass on the correctness of an order which faced inevitable modification on remand and would thus waste "the increasingly scarce time of the federal appellate courts." 429 U.S. at 19. Several decisions which hold that an interlocutory appeal ousts the district court of some or all of its jurisdiction suggest that the solution is for the party seeking district court action first to obtain leave to do so in the court of appeals;[35] that is precisely the cumbersome procedure disapproved in *Standard Oil.*

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[35] *Aune* v. *Rynders, supra* n. 10; *McLeod* v. *National Maritime Union,* 329 F. Supp. 151, 159-60 (S.D.N.Y. 1971).

The unworkability of the rule adopted by the Fourth, Fifth and Tenth Circuits is well illustrated by the circumstances of this case. On September 2, 1976, the district court adopted plaintiffs' proposed Guidelines for the fashioning of monetary and injunctive relief. On September 14, 1976, the defendant unions filed a motion for reconsideration of the September 2 order. On October 20, 1976, the defendant company renewed its earlier unsuccessful request for an evidentiary hearing on the Guidelines, a request which was also directed at obtaining a change or vacation of the September 2 order. In the meanwhile, however, apparently concerned that the 30-day time period for appealing an injunction was about to expire, the parties had on September 29 filed notices of appeal from the September 2 Guidelines. When these two motions were argued on November 3, 1976, the district court expressed "second thoughts on the guidelines" but had doubts as to whether it had jurisdiction to alter them.[36] Counsel for the defendant company urged the district court to vacate the Guidelines, arguing "this Court probably would have an inherent power to review determinations which it has made, even those which have led to an immediate appeal," [37] and assured the court that, if the Guidelines were vacated or stayed, "we would probably withdraw our appeal." [38] Persuaded by these assertions the district court on November 17, 1976, did vacate its September 2 order. Counsel for the company, however, changed its mind, and successfully urged in the court of appeals that the district judge lacked jurisdiction to grant the defendants' motions.

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[36] Transcript of Proceedings of November 3, 1976, pp. 22, 27, 29, 32.

[37] *Id.* p. 27.

[38] *Id.* p. 33.

At the least the Fourth Circuit rule strips a district court of its usual power to reconsider and modify its orders during the course of a case whenever a party takes an interlocutory appeal under section 1292(a)(1). In a case such as this the scarce resources of the federal appellate courts are thus lavished on matters no longer in controversy, since the defendants oppose the Guidelines, the district court wishes to withdraw them, and plaintiffs do not seek to appeal that withdrawal. Under the broader rule adopted by the Tenth Circuit the granting of preliminary injunctive relief, if followed by an interlocutory appeal, precludes the district court from even going forward with the merits of the case. Such results are clearly inconsistent with the efficient administration of justice. Certiorari should be granted to resolve this conflict and to reaffirm the rule in *Ex parte National Enameling.*

II.

The Court of Appeals' Finding of Non-Discrimination Is In Conflict With *Furnco Construction Corp.* v. *Waters*, 57 L.Ed. 2d 957 (1978).

The central substantive issue in this compelx employment discrimination case is whether the defendant company assigned newly hired employees on the basis of race and sex. The company conceded that prior to 1965 workers were employed "on a segregated basis" [39] and the district court so found. App. 22a. As a result, in 1965 the company employees were distributed among the company's four departments in the following manner:

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[39] Court of Appeals Appendix (hereinafter cited as "Appendix") p. 63. The union conceded this as well. *Id.* p. 86.

Total Workforce: 1965[40]

	Fabrication	*Ware-house*	*Pre-Fabrication*	*Stemmery*	*Total*
White Male	84%	5%	7%	4%	100%
White Female	94%	0%	1%	5%	100%
Black Male	26%	4%	60%	10%	100%
Black Female	34%	0%	27%	39%	100%

Between 1965 and 1971 new employees were assigned in a manner which mirrored[41] the pattern of discrimination which had grown up prior to the adoption of the 1964 Civil Rights Act:

Assignment of New Employees: 1965-1971.[42]

	Fabrication	*Ware-house*	*Pre-Fabrication*	*Stemmery*	*Total*
White Male	71% (2584)	9% (313)	7% (251)	13% (461)	100% (3609)
White Female	86% (1018)	0% (0)	1% (3)	14% (163)	100% (1184)
Black Male	29% (790)	1% (40)	11% (287)	59% (1604)	100% (2721)
Black Female	33% (262)	0% (0)	0% (0)	67% (529)	100% (791)

All of these assignments were made by the company's Assistant Personnel Manager.[43] Because of the large number of employees involved in these assignments, the odds against such a pattern of assignments occurring by chance

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[40] *Id.* pp. 496-501.

[41] The most important change is a substantial increase in the proportion of black males assigned to work in the stemmery, the worst job in the company.

[42] *Id.*, pp. 588-591. The E.E.O.C. charges on which the Title VII claim is grounded date from March, 1970. App. 9a.

[43] Appendix pp. 687-88. Two people, both white males, held this position between 1965 and 1971.

were overwhelming. The number of blacks assigned to fabrication differs from the expected number by 21 standard deviations; detailed calculations show that the likelihood of this occurring by chance is less than 1 in 10^{97}. See *Castaneda* v. *Partida*, 430 U.S. 482, 496, n.17 (1977).

The department to which an employee was assigned was important for two reasons. First, the hourly wage rates were very different; as of 1974 the top hourly wage was $4.94 in fabrication, $4.47 in the warehouse, $3.47 in prefabrication, and $2.70 in the stemmery.[44] Second, although work in the other departments is year round, employment in the stemmery is seasonal, averaging only 9 months a year.[45] Thus as of 1971 the average annual wage in fabrication, to which 75% of all whites were assigned, was over $8,000, while the average annual wage in the stemmery, to which 61% of all blacks were assigned, was under $4,000.[46]

On this basis the district court held that "[t]he statistics . . . establish a prima facie case of racial and sexual discrimination." App. 20a. The district court also rejected as unsupported by the record a variety of defenses alleged by the defendants. App. 27a-30a. It specifically held that there was no evidence that black applicants were less qualified than white applicants. App. 30a, 45a. The district court thus concluded that the defendants' practices violated Title VII and held that injunctive relief and back pay were required. App. 38a.

On appeal the Fourth Circuit did not question the district court's finding of a *prima facie* case. This Court's opinion in *Furnco Construction Corp.* v. *Waters*, 57 L.Ed. 2d 957

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[44] *Id.* pp. 416-19.

[45] *Id.* p. 93; App. 4a.

[46] The average hourly wage in fabrication is about $3.94, Appendix p. 636, or $8,195 per year for fifty-two 40 hour weeks. The average hourly wage at the stemmery is about $2.21, Appendix pp. 586, 629, or $3,447 per year for thirty-nine 40 hour weeks.

(1978), decided a month after the Fourth Circuit decision in this case, requires an appellate court in such a situation to consider whether the employer has met his burden of rebutting the *prima facie* case by "proving that he based his employment decision", here some 8,000 assignments, "on a legitimate consideration", 57 L.Ed. 2d at 968. If the employer does not meet that burden the court of appeals must find that there was intentional racial discrimination; the fact that the district court failed to make such a finding does not relieve the appellate court of its responsibility to do so. *Id.*

The Fourth Circuit, however, did not make the factual inquiry required by *Furnco*. Instead, it restricted itself to considering whether the district court had applied the correct legal standard in analyzing the evidence. The appellate court noted that the district judge had not found present purposeful discrimination "by the Company", but had reasoned somewhat opaquely that the company's "past acts of discrimination", coupled with a failure to inform applicants that those policies had ended, had created "a set of circumstances that has continued to place blacks at a disadvantage when seeking employment at Phillip Morris." App. 32a. The court of appeals believed that the district court had held that employers must maintain a racially balanced work force, a requirement the Fourth Circuit thought erroneous. App. 74a-76a. Having concluded that the district court's theory of liability was incorrect, the Fourth Circuit should either have remanded the case for application of the proper standards, *Hazelwood School District* v. *United States*, 433 U.S. 299, 309, 312 (1977), or analyzed the evidence itself in light of those standards. *Furnco Construction Corp.* v. *Waters*, *supra*. Instead the court of appeals simply, and inexplicably, directed dismissal of the race claim. This disposition is particularly difficult to understand in view of the fact that the court of appeals followed the correct proce-

dure with regard to the sex claims; reversing the district court finding of sexual discrimination in part because it was based on "the same" erroneous assumption that the employer had to proclaim a policy of non-discrimination in order to encourage racial balance, App. 90a, the court of appeals remanded the sex claim for additional findings and evidentiary hearings. App. 93a.

The court of appeals' peculiar disposition of the race claim appears to have been influenced by the assumption that the pattern of assignments between 1965 and 1973 might have been due to the fact that from 1971-73 hiring for the stemmery was conducted at a different time or location than hiring for the traditionally white departments. App. 78a. The Fourth Circuit apparently believed that blacks preferred to work at the stemmery, and thus excluded themselves for consideration for fabrication jobs by applying only for poorly paid seasonal positions at the stemmery. In fact, however, the segregation of the hiring procedures had no such impact, for 81% of all blacks chose to apply for permanent jobs rather than for work at the stemmery.[47] Given a choice between applying for permanent work or seasonal stemmery jobs, blacks overwhelmingly sought the former, most of them in the fabrication department, even though, consistent with its past practice, the company hired 33% of all blacks who applied for the stemmery[48] but only 16% of all blacks seeking permanent jobs.[49] Thus following the introduction of separate hiring procedures, which for the first time gave black applicants a method of avoiding assignment to the stemmery, the pro-

[47] Of 9795 black applicants in 1973 only 1790 applied for work at the stemmery. Appendix 493, 626.

[48] In 1973 the company hired 583 of the 1790 blacks who applied for work at the stemmery. Appendix, pp. 591, 626.

[49] In 1973 the company hired 1250 of the 8005 blacks who applied for pemanent jobs. Appendix, pp. 493, 587, 626.

portion of blacks among employees hired into fabrication did not decrease, as the court of appeals assumed, but actually rose from 18% in 1970 to 41% in 1972.[50] That change graphically illustrates the discriminatory nature of the assignment practices which were particularly effective prior to 1971.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the court of appeals; in the alternative, Certiorari should be granted and the case remanded to the Fourth Circuit for reconsideration in light of *Furnco Construction Corp.* v. *Waters.*

Respectfully submitted,

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[50] Appendix p. 588.

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISON

Civ. A. No. 73-0488-R.

July 7, 1976.

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NORA LEWIS, et al,,

Plaintiffs

- vs -

PHILIP MORRIS, INC., et al.,

Defendants.

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MEMORANDUM

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HERHIGE, District Judge.

This class action is brought for alleged discrimination against females in employment matters in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e), et seq., for alleged dicrimination against blacks in employment matters in violation of both Title

VII, supra, and the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, and for an alleged breach of a union's statutory duty to fairly represent all of its members. Section 9(a) of the National Labort Relations Act, as amended, 29 U.SA.C. §159(a); see Vaca v. Sipte, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967). The named plaintiffs, Nora Lewis, Elizabeth Bullock, Mary Carter, Betty Johnson, and Gertrude Moody, are all black female citizens of the United States residing in the City of Richmond, Virginia. They are employed by Philip Morris, Inc., at its facilities in Richmond, Virginia and are members of Local 203 of the Tobacco Workers' International Union.

Defendant Philip Morris, Inc., (hereinafter "Philip Morris" or "Company") is a corporation organized under the laws of the State of Virginina and engaged in the business of manufacturing and marketing consumer goods that travel in interstate and foreign commerce. It has several cigarette manufacturing plants in the City of Richmond, Virginia. Accordingly, the defendant Philip Morris is an employer in the industry affecting commerce within the meaning of §701(b) of the Civil Rights Act of 1964, 42 U.S.C. §2000e(b),

and is subject to the provisions of 42 U.S.C. §1981. See Johnson v. Railway Express Agency, 421 U.S. 454, 459 60, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40, 93 S.Ct. 1090, 34 L.Ed.2d 403 (1973); cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). Defendant Local 203 of the Tobacco Workers' International Union (hereinafter "Local 203") is an unincorporated association and a labor union, duly designated and elected as the representative for the purpose of collective bargaining of approximately 5,300 hourly paid employees of Philip Morris in its facilities in Richmond, Virginia. Defendant Tobacco Workers' International Union (hereinafter "International Union") is an unincorporated association and labor union headquartered in Washington, D.C.; Local 203 and a number of other local unions are affiliated with International Union. Accordingly, defendants Local 203 and International Union are both labor organizations engaged in an industry affecting commerce within the meaning of §701(d) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(d) and (e), and are subject to the provisions of 42 U.S.C. §1981. See Johnson v. Railway Express

Agency, supra; Tillman v. Wheaton-Haven Recreation Ass'n, supra.

This Court has jurisdiction over the claims raised in the instant action pursuant to 42 U.S.C. §2000e-5(f), 28 U.S.C. §1343(4), and 28 U.S.C. §1337.[1/]

The Company's manufacturing operations in Richmond are departmentalized as follows: (1) Warehouse, Shipping and Receiving (hereinafter ("WSR"); (2) the Green Leaf Stemmery (hereinafter ("Stemmery") -- where the then current crop of tobacco is processed for storage; (3) Prefabrication -- where tobacco in bulk is processed for cigarette manufacture; and (4) Fabrication -- where the cigarettes are manufactured. All the Richmond employees of Philip Morris except the Stemmery employees are employed on a year round basis; the Stemmery employees, with the exception of a small housekeeping staff, are employed seasonally for the period of July to March.

1/ E.g., Munford v. Glover, 503 F.2d 878, 883 (5th Cir. 1974); Retana v. Local 14, 453 F.2d 1018, 1021-22 (9th Cir. 1972).

The employees represented by defendant Local 203 include both the seasonal employees of Philip Morris who work at the Stemmery, and the permanent hourly-paid employees who work at the other Company manufacturing locations. Rates of pay, job progression, transfer and seniority of employees, working conditions, and employee benefits are covered by two collective bargaining agreements between the Company and Local 203. One agreement -- the "main contract" -- covers the permanent employees, and the other -- the "supplemental contract" covers the seasonal employees. The contracts presently in force were negotiated in January 1974, and took effect February 1, 1974 for a three year period to expire on January 31, 1977. The contracts follow the pattern set by prior contracts between the Company and Local 203, commencing with those neogiated in the fall of 1964 which became effective on February 1, 1965.

Named plaintiff Elizabeth Bullock was first employed by the Company in November 1966; plaintiff Gertrude Moody was first employed in October 1966; plaintiffs Nora Lewis, Mary Carter, and Betty Johnson were first employed in December 1968. Each of the named plaintiffs was first

employed in the Stemmery, and remained there until April 25, 1972 when they were transferred to the Fabrication Department. Upon their transfer, they acquired transfer date seniority in accordance with the seniority system set forth in the then current 1971 collective bargaining agreement. Each was intitally assigned to the entry level "miscelláneous" job classification in the fabrication process, which required them to perform the arduous task of hanging of trays. The hanging of trays required lifting up six trays per minute, each weighing up to forty pounds, to a height of over six feet.

By order of October 7, 1974, the Court determined that the action be maintained as a class action pursuant to Rule 23(b)(2) of the Fed. R. Civ. P., see e.g., Robinson v. Lorillard Corporation, 444 F.2d 791, 802 (4th Cir. 1971), on behalf of a class consisting of the named plaintiffs and all females and black males, whether currently employed or no longer employed for any reason, who were employees of the defendant Philip Morris's Green Leaf Stemmery on or after July 2, 1965. See Patterson, et al. v. The American Tobacco Company, C.A., 535 F.2d 257, at 262 (4th Cir. 1976). The class consists of approximately

3,130 persons. Notice, pursuant to Rule 23(b)(2) of the Fed. R. Civ. P., was given by mail to each of the class members on October 8 and or 11, 1974, and notices of the pendency of the action were posted at several locations on the premises of Philip Morris.

The plaintiffs initialy contended that the Company, with the assent and cooperation of the defendant unions, discriminated against female members of the class on the grounds of their sex and against black members of the class on the grounds of their race, and additionally, that the defendant Unions failed to press grievances of females or black males with the same diligence as those of white males. More specifically, the complaint alleges that discrimination was perpetuated by: (1) intially assigning females and black employees to seasonal Stemmery jobs in numbers disporportionately large as compared to the initial assignment of white males to Stemmery jobs; (2) paying female Stemmery and black Stemmery employees less than white male Stemmery employess for comparable work; (3) maintaining unlawful seniority and transfer polices which restricted female Stemmery and black male Stemmery

employees from transferring to other plants; (4) promoting and transferring junior white male Stemmery employees over senior Stemmery females; (5) segregating female Stemmery employees into separate "female" jobs; (6) assigning black female employees transferred from Stemmery to the most arduous jobs in the Fabrication Department for disporportionately long periods of time; (7) passing over females and black male employees with greater experience, skill and seniority than white males (i) in the selection of supervisory personnel, and (ii) in providing training for and access to skilled and craft positions; (8) laying off senior females and black males before junior white males in reduction of force; and (9) maintaining disability leave policies which discriminate against maternity leave.

Shortly before trial, however, the parties entered into an agreement for a partial settlement, which provided inter alia that trial would be limited to the following issues: (1) whether the members of the class were hired into the Stemmery rather than into permanent employment as a result of racial or sexual discrimination; (2) whether the transfer, promotion, seniority, intial

job assignment and wage rate policies discriminated against class members on the basis of race or sex, except in the selection of supervisory and craft personnel; (3) if discrimination in any of the foregoing were found, whether injunctive relief is appropriate and what amount of back pay, if any, should be awarded class members; and (4) what costs, expenses and attorney fees should be awarded. All claims for affirmative relief sought on the basis of alleged discriminatory working or disciplinary conditions were withdrawn. The maternity leave issue was expressly reserved. The partial settlement agreement was approved by the Court on June 6, 1975 after appropriate notice of the agreement was given all members of the class, pursuant to the provisions of Rule 23(e) of the Fed. R. Civ. P.

On or about March 16, 1970, the named plaintiffs Mary Carter, Elizabeth Bullock, and Gertrude Moody, along with thirty-six other black female employees at the Company, filed charges with the Equal Employment Opportunity Commission (hereinafter "EEOC") alleging violation of their rights under Title VII of the Civil Rights Act of 1964. On or about October 29, 1972,

named plaintiffs Nora Lewis and Betty Johnson filed similar charges with the EEOC. On that same day, plaintiffs Carter, Bullock and Moody filed additional charges with the EEOC alleging violations of their rights under the Civil Rights Act. The complaints filed with the EEOC, taken together, expressly list all the defendants as offending parties. In letters dated July 25, 1973, the EEOC advised all of the named plaintiffs of their right to institute an action in federal court. In letters dated August 21, 1973, the EEOC advised plaintiffs Mary Carter, Elizabeth Bullock, and Gertrude Moody of their right to sue on their amended charges. The instant action was filed on September 9, 1973 within the 90-day period specified in 42 U.S.C. §2000e-5(f).

The defendant International Union contends that it was not served with notice of the EEOC charges, nor approached by the EEOC in conciliation negotiation, and argues, therefore, that it should be dismissed as a party defendant. The United States Court of Appeals for the Fourth Circuit has held, however, that the Commission's failure to attempt conciliation or serve notice on defendants of filed charges is not a jurisdic-

tional bar to an employee's action if the employee has properly filed his complaint. An employee cannot be charged with the Commission's failure to execute its statutory duties. Russell v. American Tobacco Company, 528 F.2d 357 at 365 (4th Cir. 1975). Accordingly, the Court concludes that International Union is properly before it as a party defendant.

Before turning to the factual findings, the Comany's contention that this Court's previous decision of Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968), is dispositive of the race discrimination claims asserted in the instant action on the grounds of res judicata, collateral estoppel, or stare decisis, must be addressed. In Quarles, a black employee of Philip Morris brought a class action agains the Company, Local 203 and the Local's President on behalf of all blacks employed therein alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The Court held inter alia that "The company has not engaged in discriminatory hiring practices since January 1, 1966, and consequently, the plainiffs are not entitled to relief on this issue." It also held

that Stemmery employees were not discriminated against by the advancement, transfer, and seniority policies of the Company.

"In fashioning a remedy the court must first determine the class of employees to which it is applicable. . . Employees of the stemmery are not included in the class. They are seasonal employees hired on a temporary basis only. They do not attain permanent employment seniority unless they are hired as regular employees in another department. The company's experience with the generally poor quality of labor available on a seasonal basis provides a rational classification that distinguishes seasonal employees from permanent employees." 279 F.Supp. at 519.

If the decision is deemed to be contolling over the instant controversy, it would bar those members of the class who were members of the Quarles class from relief on the grounds of res judicata, and it would serve as a strong precedent against those members of the present class not parties of the class in Quarles on the grounds of stare decisis -- unless the plaintiffs can show a significant change in the factual circumstances from those of the Quarles case, that decision would control. However, the Court concludes on

the basis of either of two rationales that Quarels does not so control, for the class in Quarles did not adequately represent the claims of the class in the instant case.

Although the class in Quarles did include Stemmery employees, indeed the named plaintiffs in that case were former stemmery employees who had transferred to the Prefabrication Department, the claims of the Stemmery employees were seemingly lost in the breadth and ambition of the class's overall interest. Quarles, which was one of the early resolutions of a Title VII controversy, reflects in its opinion and documents contained in the case file that the plaintiffs therein were, in part, seeking to secure equal benefit for what readily appeared to be a deserving class -- the black permanent employees of the Company. For example, in the Court's findings that the Company had not engaged in discriminatory hiring practices after January 1, 1966, the Court based its conclusion on the fact that the percentage of blacks in Fabrication and WRS had been substantially increased. It also noted, with less emphasis, that the percentage of blacks in the Stemmery and Prefabrication, "while still large," had been

reduced. The Court's findings that blacks were not discriminated against in payment scales was based on a consideration of the rates of comparable jobs in the permenent departments, even though jobs existed in the seasonal departments that could be compared to similar jobs in the permanent departments. Additionally, the Court summarily excluded the Stemmery employees from any consideration of promotion or transfer discrimination, while granting relief to blacks in one of the Company's permanent departments. The Quarles opinion, authorized by now United States Circuit Judge John D. Butzner, was and is one of the monumental decisions in the area of Title VII law for its astute realization that practices that are currently neutral may, in effect, perpetuate past discriminatory practices. It suffers, however, from the plaintiffs' attempt to include a broad class of litigants and yet prepare and advocate with force the claims of some class members to the detriment of a distinct and aggrieved alternate portion of the class.

As Mr. Justice Harlan observed: "The judgment in a class action will bind only those members of the class whose interests have been adequately

represented by existing parties to the litigation." Sam Fox Publishing Co. v. United States, 366 U.S. 683, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961). See Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir. 1975); Gonzales v. Cassidy, 474 F.2d 67, 74-75 (5th Cir. 1973); M. Frankel, Some Prelininary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1867). See also Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The generally accepted standard to be employed for determining whether the class was adequately represented in Quarles is whether the class representatives, through their counsel, vigorously and tenaciously protected the interests of the entire class. See Gonzales v. Cassidy, supra. Viewing the entire Quarles record and the Court's finding in that case, the Court now concludes that the interests of the seasonal employees of Philip Morris were not satisfactorily advanced and litigated.

The situation of the seasonal employees was exacerbated by the failure to notify the members of the class of the pendency of the litigation. Although Rule 23 does not mandate notice for (b)(2) actions such as the instant one, the Federal Rules of Civil Procedure must give way to constitutional

imperatives. In the typical (b)(2) class action, notice would not appear to be necessary; the class is typically homogenous without major conflicting interests between members, and often it is small in number. In most (b)(2) cases, "[n]otice would add little or nothing." 3B J. Moore, Federal Practice ¶23.07[1] (2d ed. 1974) at 1152. However, most racial and/or sexual discrimination cases simply do not fit this sterotype. They are large and often encompass a varied set of subclasses -- this case, for example, includes both blacks and females. Indeed recent Fourth Circuit decisions indicate that it should be the policy of the federal courts to be receptive to large classes in discrimination suits so as to effectively finalize the controversy with respect to the defendants and to, by economics of scale, reduce the plaintiffs' and defendants' trial costs. See Barnett v. W.T. Grant Co., 518 F.2d 543, 548 (4th Cir. 1975). See also Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974); Parham v. Southwestern Bell Telephone Co., 443 F.2d 421 (8th Cir. 1970); Rich v. Martin Marietta Corp., 522 F.2d 333, 341 (10th Cir. 1975). Binding all class litigants to a judgment when they have had no notice to the action served on them, runs a

substantial risk that the class members may in fact be prejudiced without being heard or without having the opportunity to assess, for themselves, the adequacy of their purported representatives. As was noted by Mr. Justice Jackson in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.2d 865 (1950), "[t]his right ot be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The counter arguments, (1) that the district judge can accurately assess the representativeness of the named plaintiffs and (2) that aggrieved class members can collaterally attack the judgment, assume much in an area of constitutional significance that typically will tolerate few assumptions. The first argument assumes that the district judge can foresee all the potential claims that may be raised by class members in contesting the adequacy of the class representatives and resolve them, perhaps without specifically pointed argument, in a favorable manner. This burden becomes more weighty as the class size and diversity of class membership increase. The

second argument is a smoke screen for justifying the blatant realization that some litigants have not been or may not be afforded due process under the procedures folowed in the first case. It is, of course, far better to utilize appropriate procedures at the first trial, than to throw the burden upon the litigants who, in the face of a seemingly valid judgment directly on the matter in controversy, must attempt to regroup as a subclass and argue, after-the-fact, that they were not adequately represented. Furthermore, allowing or encouraging liberal collateral attacks on (b)(2) class actions, defeats one of the prominant purposes of class certification -- that of achieving a finality of claims with respect to the defendants. Again, the potential and the need for collateral attacks on the first judgment is augmented as the class size and diversity of its membership increases. There is a point at which judicial paternalism is simply inoperable, and the class members must be given the ability and the opportunity to assess the adequacy of their representatives themselves by being served with a proper notification of the proceeding and their options therein. That point was surpassed in the

Quarles case. See Schrader v. Selective Service System Local Board No. 76, 470 F.2d 73 (7th Cir. 1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968) (dicta), rev'd on other grounds, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1968); Hoston v. United States Gypsum Co. 67 F.R.D. 650 (E.D. La. 1975); Newman v. Avco Corp., 380 F.Supp. 1282 (M.D. Tenn. 1974); McCarthy v. Director of Selective Service System, 322 F.Supp. 1032 (E.D. Wis. 1970), aff'd per curuam on other grounds, 460 F.2d 1089 (7th Cir. 1972). But see Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir. 1975); Gonzales v. Cassidy, supra. In Quarles the class was large and subsumed several distinct subclasses; the danger of failing to adequately consider the plight of one or more of these subclasses was readily apparent. Under the circumstances, an order directing that all class members be notified of the action so they could champion their own interests should have been requested and entered. The failure to so do requires the court to now hold, consistent with the constitutional demands of the due process

clause of the Fourteenth Amendment, that the class members of the instant suit -- the Stemmery employees -- were not parties in any meaningful sense to the Quarles action and, therefore, are not bound by its decree under the principles of res judicata. Nor are they bound by the principles of stare decisis, for the issues pertinent in this action were not fully and fairly resolved in the previous one.

Recent case law indicates that a prima facie case of discrimination may be demonstrated by statistical evidence that blacks and/or females receive disparate treatment from that afforded whites and/or males at the hands of the defendants. e.g., Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); and that burden shifts to the defendants to come forward with evidence to rebut the plaintiffs' cause. E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); United States v. Chesapeake & Ohio Railway Co., 471 F.2d 582 (4th Cir. 1972); see also United States v. Hayes International Corp., 456 F.2d 112, 120 (5th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 550 (9th Cir. 1971). Cf. Albemarle

Paper Co. v. Moody, 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d at 280 (1975).

The statistics gathered by the plaintiffs and submitted in evidence establish a prima facie case of racial and sexual discrimination. Philip Morris assigned over fifty percent of all blacks initially hired from 1965 to 1974 to the seasonal Stemmery jobs, as compared with the assignment of only eleven and five-tenths of all whites hired in the same period to the Stemmery. These percentages reveal a disproportionate assignment of newly hired blacks to the Stemmery where the work is temporary and less financially remunerative. As a consequence, during the 1965 to 1974 period, an average of seventy-nine and five-tenths precent of all the hires in the Stemmery were black as compared with an average percentage of blacks in the Richmond work force of about twenty-four percent.[2/] The heavy assignment of blacks to

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2/ The Standard Metropolitan Statistical Area (SMSA) for Richmond as defined by the Bureau of the Census for 1960 included the City of Richmond and the Counties of Chesterfield and Henrico. The 1960 census reports that the civilian labor force was 169,554, of which 42,942 (25.3%) were blacks and 82,142 (48.4%) were females.

of blacks to the Stemmery has caused it to be a predominately black department; during the 1965 to 1974 period the average percentage of blacks in the Stemmery work force was eighty-four and three-tenths percent. These statistics are particularly significant in light of the Stemmery's history; since its inception in the 1930's and until the early 1960's, the Stemmery operation has been manned almost exclusively by blacks in accordance with a racially defined

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2/ Cont'd

The Standard Metropolitan Statistical area (SMSA) for Richmond as defined by the Bureau of the Census for 1970 included the City of Richmond and the Counties of Chesterfield, Henrico and Hanover. The 1970 census reports that the civilian labor force over age 16 in the Richmond SMSA was 225,007, of which 52,409 (23.3%) were blacks and 93,937 (41.7%) were females.

On April 27, 1973, the Richmond Standard Metropolitan Statistical Area (SMSA) was revised to include three additional counties. Charles City, Goochland and Powhatan. The 1973 Richmond SMSA included the City of Richmond and the Counties of Chesterfield, henrico, Hanover, Charles City, Goochland and Powhatan. In 1973, the civilian labor force over age 16 in the Richmond SMSA was 233,068, of which 56,090 (24%) were blacks and 96,775 (42%) were females.

departmental system.[3] Whites were hired into and employed in the Fabrication operations and the WSR operation, while blacks were hired into the Stemmery and Prefabrication operations. At first glance, the data seems to indicate that the racially defined system is being maintained.

Transfers from the Stemmery were largely limited to openings in the Prefabrication Department until the rules governing the transfers of seasonal employees to permanent employment were changed in the 1974 labor contract to allow seasonal workers to fill entry level vacancies in all areas of permenent employment during periods of Stemmery shutdown. Prefabrication, also historically a black department, continues to be populated largely by blacks. The 1974 contract,

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2/ Cont'd.

The 1970-73 Virginia Employment Commission estimates of the percent of the total work force which is comprised of blacks and females in the Ricghmond SMSA is as follows:

Minority (black) 23.6% of the total work force. Female 41.0% of the total work force.

3/ So as to comply with executive orders then issued, the Company, on May 1, 1961, established a "Factories Employment Policy" which sought to employ and promote employees without regard to race.

however, provides permanent department employees transferring from one permanent department to another with seniority from the date on which they were first permanently hired, while it provides Stemmery employees who transfer with seniority only from the date they first transferred to permanent employment. Accordingly, a Stemmery employee will always be junior in subsequent transfers to an employee hired into one of the permanent departments although both were hired on the same day.

Additionally, the plaintiffs have produced evidence that several company job classifications within each department are predominately "White" or "black", and "male" or "female." In the Stemmery, the female jobs have been in the "light labor" category, and the male jobs have been in the "heavy labor" category. Furthermore, the higher order or "key" jobs have also been sexually sterotyped; there are female tag meter operators, male line-out and press operators, male fork lift operators, and a predominately male skeleton crew that works during the shutdown period at the Stemmery. Individuals transferring from the

Stemmery to other departments were also greeted with job sterotyping. The Prefabrication Department also maintained a "light labor" and "heavy labor" classification; in Fabrication the jobs of head-fixer and fixer are male, and the jobs of catcher attendant, examiner, and inspector are female; there has never been a female transfer from the Stemmery to WSR. With respect to the claims of racial discrimination, there have never been any blacks in the highest paying fabrication jobs of "head-fixer", stockroom clerk, or watchman. Several jobs in all of the departments have been totally or predominately filled by one race or sex.

In response to the plaintiffs' claims of hiring discrimination, the defendants have produced evidence indicating that blacks are more willing to accept employment at the seasonal facility, and that Fabrication and WSR, the historically white departments, have a substantial proportion of black workers.

Prior to 1971, all of the hiring of hourly employees was done at the 20th Street facility. In 1971, a separate hiring office was opened in the Westab Building on Commerce Road. At Westab,

one day a week was assigned exclusively to the hiring of seasonal employees, and the remaining four days assigned to the hiring of permanent employees. Applicants for permanent or seasonal employment applying on an unappropriate day were instructed where and when to reapply. Westab was in turn closed at the end of 1972, and separate hiring offices were established at separate locations for permanent and seasonal hiring. The defendants introduced evidence that of 3,005 applicants for employment who appeared at the seasonal employment office seeking work in the period from 1973 to 1974, only 177, or five and five-tenths percent, were white. Hiring proved to be proportionate to the applicant ratio; out of a total of 992 Stemmery hirees in that period, 50, or five percent were white. Additionally, the defendants demonstrated that the attrition rate among black Stemmery employees has averaged forty-one and one-tenth percent over the last ten years, whereas the white average attrition rate was forty-four and one-tenth percent.[4/] In con-

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4/ The attrition rate is measured by the ratio between the number whose employment with the Company terminated during a given period, excluding those employees transferring to permanent employment, to the total number who worked in the

clusion, the defendants contend that blacks work in the Stemmery because they prefer to work there, while whites are unwilling to accept the work.

The argument has three possible components: First, it may be based on the proposition that of those people that are in fact qualified only to perform Stemmery work, only the black portion of the group applies to the plants of Philip Morris for work and is willing to accept Stemmery work. This is another way of saying that blacks that apply to Philip Morris facilities are on the whole less qualified than whites that apply to the same facilities. No evidence was introduced at trial in support of such a proposition and it may be and is rejected out of hand. Second, it may be based on the proposition that, although whites and blacks are hired in appropriate ratios in all the permanent departments, once the decision is advanced to the applicant that a permanent job is

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4/ Cont'd.

Department during that period. However, the evidentiary significance of the data is diminished by the fact that both the white and black attrition rates are substantially higher than the rates in any of the permanent departments.

not available, (because of racially neutral hiring cycles or a lack of suitable qualifications) whites refuse to work and blacks accept it. Third, it may be based on the proposition that blacks prefer to work in the Stemmery, even though given the choice of applying for permanent employment.

The second propostion is potentially supported by inference from the defendants' evidence that the Company's two traditionally white departments now have a substantial population of black workers. As of December 31, 1974, both Fabrication and WSR had a black population that represent a reasonable degree of integration. As compared to the number of blacks in the Richmond work force, approximately twenty-four percent, Fabrication has approximately forty-one percent blacks in its work personnel, and WSR has approximately twenty-eight percent. From January 1, 1965 to December 31, 1974, thirty-two percent of all personnel hired into Fabrication and sixteen percent of all personnel hired into WSR were black. Such data seems to indicate that when positions are available in these two departments, hiring is non-discriminating. If the third

permanent department, Prefabrication, is similar in composition, it would support an inference that all permanent positions are filled nondiscriminately and that blacks are willing to accept the seasonal positions with more frequency than whites. However, two unexplained factors destroy the inference. First, Prefabrication, historically black, continues to be populated by an approximately eighty-five percent black work force [as of 1974]. From January 1, 1965 to December 31, 1974, of all the personnel hired into Prefabrication sixty-three percent were black. Sixty-three percent of all blacks hired between 1965 and 1974 were either assigned to the stemmery or Prefabrication; almost two out of every three blacks hired. Yet only eighteen and eight-tenths percent of the whites hired during the same period were initially assigned to these two departments; almost one out of every five whites hired. A distinction between permanent and nonpermanent hiring is not borne out by the facts. Instead the argument is forced into the form that most whites desire only positions in the WSR and Fabrication Departments, which are filled nondis-

criminately, and once denied these positions they will not accept employment in either Prefabrication or the Stemmery. In such a form it merely begs the question of why, percentage-wise, so many more blacks than whites are assigned to specified departments.[5/] Furthermore, and this reasoning applied with equal force against the third component heretofore noted, no reason has been advanced as to why blacks, as opposed to whites, are so inclined to accept or prefer the seasonal and lower paying jobs of the Stemmery. It is clear from the evidence that blacks are qualified and do fill the permanent positions in the WSR and Fabrication Departments. The defendants do not claim, as has been theretofore, noted, that the black applicants are, on the average, less

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5/ The evidence of white unwillingness to work in the Stemmery is also somewhat questionable in light of the 1965 statistics. In 1965 the Company hired only 68 blacks into the Stemmery as opposed to 186 whites, for a percentage of black hires of only 26.8 percent. That year represented a concerted effort to hire whites into Stemmery work. For all the other years for which the Court has been provided data, the percentage of black hires ran from 73 to 98 percent.

able and qualified than white applicants. What perverseness makes blacks as opposed to whites more willing to accept what appear to be less desirable jobs?

The answer in the Court's view lies in the testimony of the plaintiffs' witness that "if you want to get hired, you know, being black, your best chance would be to go through the Stemmery and then transfer to permanent employment later." Philip Morris' history of segregated departments, and the continued dominance of blacks in the traditionally black departments, has led a substantial number of the blacks applying to Philip Morris for work to the understanding that their most likely opportunity for employment would be in the Stemmery. It is not surprising that the lines to the Stemmery hiring office are populated with aspiring black workers, nor is it surprising that blacks may, in interviewing, exhibit a preference for Stemmery work. It appears to a substantial number of black applicants that they either take a Stemmery job or look for work with another employer. Given this background, any notion of "preference" is meaningless; to prefer one alternative to another, one must believe that both alternatives are available.

The Court is unable to find, however, on the basis of the record before it that the excessive assignment of blacks to the Stemmery was purposefully undertaken by the Company to covertly continue its historical system of segregated departments. What has been established is that the Company, although liberally proclaiming that it assigns new hires without regard to their race, has unfortunately done nothing to dispel the belief, founded in its past acts of discrimination, and held by a substantial number of black applicants, that it still assigns new employees to departments on the basis of race. Such a belief has translated itself into a set of circumstances that had continued to place blacks at a disadvantage when seeking employment at Philip Morris. The Company's professed neutrality, is, in fact, not neutral, for past acts of discrimination continue to significantly affect modern practice. "Under the Act, practices, procedures, or test neutral on their face, and even neutral in terms of intent, cannot be maintained if they opreate to 'freeze' the status quo of prior discriminatory employment practices." Griggs v.

Duke Power Co., 401 U.S.C. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). See also Quarles v. Philip Morris, Inc., supra. The Company, in order to reassert a balance, should have informed all applicants for hourly positions at the beginning of any interview (1) of the positions currently available in each of the four departments with an appropriate job description, and (2) that it assigns and hires new workers without reference to race. All those class members that were not so informed when they were hired into the Stemmery, and that believed that their race substantially limited their intial employment to the Stemmery are entitled to recover for their losses. "What is required of Congrtess is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Griggs v. Duke Power Co., 401 U.S. at 431, 91 S.Ct. at 853, (Emphasis added) Cf. Barnett v. W.T. Grant Co., supra, 518 F.2d at 547; Lea v. Cone Mills Corp., 301 F.Supp. 97, 102 (M.D. N.C. 1969), aff'd in part, 438 F.2d 86 (4th Cir. 1971).

With respect to the plaintiffs' claims that the Company continues to maintain "male" and "female" job classifications within the Stemmery, and that transfers from the Stemmery face "male" and "female", and "white" and "black" job classifications within the permanent departments, the argument is similar. The Company answers the allegations with the contention that, although in the past discrimination patterns with regard to race or sex did exist, jobs are now available to all races and both sexes when openings are created by retirement, transfer, or expanded capacity demands. Additionally, it has introduced evidence of average pay levels to prove that the Company does not discriminate with respect to pay between the various job classifications with respect to race or sex. Finally, the defendants assert that males tend to avoid job categories in which females predominate, and that females are reluctant to qualify for jobs which require a high degree of mechanical skill. In light of the strong evidence of past acts of discrimination, and the evidence of present segregation among job classification, it is the duty and the burden of

the defendants to inform all potential applicants for the various openings of said openings as they develop and that these openings would be filled without regard to sex or race. Those applicants in the class that were not so informed and that would have applied for any such openings if informed, are entitled to recovery.

The plaintiffs' attack the labor provisions governing seniority, transfer and promotion of seasonal employees on the grounds that they lock seasonal employees into seasonal positions. These provisions are discriminatory on racial or sexual grounds only if class members are assigned to seasonal positions on racial or sexual criteria. Since the Court has concluded that class members are often led to seek employment in the Stemmery on the basis of past racial discrimination, it must also conclude that the labor provisions that restrict the seniority, transfer and promotional rights of a seasonal employee so situated are likewise discriminatory. However, such a finding does not require a redrafting of the seniority, transfer, or promotion rules; it is the initial assignment policies that taint the system. The fact that Stemmery employees are more restricted in their transfer rights than permanent employees,

without evidence of impermissible discrimination, would represent a justifiable policy. Seasonal employees are adjudged to be poorer workers on the whole and must prove themselves in a permanent capacity before they are given the rights and benefits of permanent workers. See Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h).

The defendant unions are liable with the Company to these class members that are able to recover under the theories heretofore noted, for the Union also has a checkered past.[6/] Along with the racially segregated departments of Philip Morris, there also existed racially segregated local unions. Local 209 of the Tobacco Workers' International Union represented only blacks in Prefabrication, Stemmery, and the janitorial

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6/ The International Union, due to its heavy involvement in Local 203's activities, is jointly responsible with the Local for the Union's failure to fulfill its duties to the union membership. See Patterson v. American Tobacco Company, supra, at 270-271. International was an active advisor to the Local, and sat in on most of the Local's negotiations with the Company for collective-bargaining agreements.

staff. Local 203 of the Tobacco Workers' International Union represented only whites in Fabrication and WSR. While separate unions existed, the Company and the unions negotiated uneuqal wages for the same work with blacks generally receiving the lower wages. In 1963, in response to a Presidential Executive Order, Local 209 and Local 203 merged; Local 203 became the surviving entity. Since the union's past indicates that it facilitated the Company's tradition of segregated departments, it also must share the responsibility for informing its members that all jobs are open in all departments without regard to race or sex so as to mollify members' present understanding as based on past history. Its failure to perform this function makes it jointly liable with the Company to those plaintiffs entitled to recover.

The Court finds, however, that there is no evidence of arbitrary action or bad faith conduct on the part of the defendant unions towards the class members in the handling of class member grievances, see Griffin v. International Union, United Automobile, A & A I W, 469 F.2d 181 (4th Cir. 1972), or in representing the seasonal employees in the negotiation process with Philip

Morris. Accordingly, the Unions were not guilty of breach of their statutorty duty of fair representation.

Counsel will be directed to meet and brief the Court on the appropriate procedure for ascertaining the relief that should be made available to those class members entitled to recover in this cause. See generally, Franks v. Bowman Transportation Company, Inc., et al., 42 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444, 44 U.S.L.W. 4356 (1976); Albemarle Paper Co v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

An appropriate order will issue.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISON

Civ. A. No. 73-0488-R.

September 2, 1976

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NORA LEWIS, et al.,

Plaintiffs

- vs -

PHILIP MORRIS, INC., et al.,

Defendants.

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ORDER ADOPTING PLAINTIFFS' BACK PAY AND INJUNCTIVE RELIEF GUIDELINES

MERHIGE. D.J.: All counsel having represented memoranda on suggested procedures to facilitate an award of relief in this case which have been fully considered; and

This Court being persuaded that the adoption and entry of Back Pay and Injunctive Relief

Guidelines is necessary and appropriate to clarify, simplify, and expedite the "State II" proceedings; and that the Guidelines proposed by plainitffs are consistent with and required by applicable law including the Court's memorandum opinion herein;

Now, therefore, it is hereby Ordered that the Court adopts and enters the Back Pay and Injunctive Relief Guidelines attached hereto and incorporated by reference herein. All Stage II proceedings herein shall be governed by and consistent with these Guidelines.

So Ordered.

Back Pay Guidelines

Guideline 1. Present Posture of the Case:

Certain issues previously disputed in this case are now foreclosed by the Court's memorandum opinion. The testimony and documentary evidence already admitted shall not be duplicated in the back pay determinations, except as to the extent permitted herein, and any defenses appropriate to the liability stage of the case are now precluded and shall not be litigated in the back pay determinations. English v. Seaboard Coastline R.R. Co.,

12 F.E.P. Cases 9D (S.D. Ga. 1975). And in accordance with the earlier memorandum opinion, this Court makes the following findings and conclusions which are not subject to further litigation by the parties.

(a) The defendants did nothing to inform Blacks or to dispel their beliefs based upon past acts of discrimination, and held by a substantial number of applicants, that the Company still assigns new hires to departments on the basis of race. Such a practice though neutral on its face, and probably even neutral in terms of intent, operated to "freeeze" the status quo of prior discriminatory employment practices, thus violating the Congressional mandate that employers remove artificial, arbitrary, and unnecessary barriers to employment which operate invidiously to discriminate on the basis of race or other impermissible classifications. Similarly, with respect to segregation among job classifications, because of the defendants' failure to take sufficient affirmative actions to desegregate "male"

and "female" and "black" and "white" jobs, there is unlawful discrimination in violation of Title VII.[1/]

(b) Because of the aforementioned findings of discrimination, all affected members of the plaintiff class are entitled to recover for their losses through backpay and injunctive relief.

(c) The sole back pay issues now pending before the Court are: (1) which class members will receive back pay; and (2) how much will each individual recover? All defenses advanced with regard to the determination of a class-wide right to back pay, and all defenses to individual back pay based on arguments applicable to the class as a whole which have been rejected by the Court's decision shall not be used as defenses in any second stage proceedings.[2/]

1/ Court's Memorandum Opinion, pp. 21-23 (entered July 7, 1976).

2/ Among the defenses specifically included within the prohibition of this paragraph are the following:

(a) The failure of any class member to apply for or seek transfer from the Stemmery to other permanent departments; Hairston

Guideline 2. Back Pay Period:

The period for which plaintiffs and class members may recover awards of back pay in this case is from March 16, 1968, to at least the date of entry of the final decree in this action, with either extension of the period or supplementation of the award for those cliamants who have not yet attained their "rightful place" by the date of the final judgment. Patterson v. American Tobacco Co., ____ F.2d ____ 12 F.E.P. Cases 314, 323 (4th Cir. 1976); and see 42 U.S.C. §2000e-5(g).

Guideline 3. Eligible Back Pay Class Members:

The named plaintiffs and all females and black males, whether currently employed or no

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2/ Cont'd

v. McLean Trucking Co., 520 F.2d 226, 232 (4th Cir. 1975).

(b) The good or bad faith of defendants or lack thereof. Albemarle Paper Co. v. Moody, supra, 45 L.Ed.2d at 299.

(c) The fact that there may have been less available vacancies than qualified class members to fill them. Pettway, supra, 494 F.2d at 260.

longer employed for any reason, who were employees of the GLS on or after July 2, 1965 are eligible for consideration for a back pay award. Persons presently retired, disabled, or otherwise terminated from the company are not thereby excluded from the back pay class. In the case of deceased persons within the class defined for back pay eligibility, claims may be maintained on their behalf and any awards to such persons will accrue to the beneficiaries as designated on defendant's insurance or payroll records.

Guideline 4. Identification of Back Pay Class Members:

Within fifteen (15) days after entry of these guidelines, the company, using its employment and payroll records and other resources available to it, will supply to plaintiffs' counsel and the Court a list showing the name, address or last known address, employment and seniority date, social security number and income by month and year, of every individual eligible for back pay as specified in No. 3 above.

Guideline 5. Proof Required For Recovery of Back Pay:

Plaintiffs have already shown (a) the existence of consistent and substantial disparities in income and income opportunities between members of the class and white males hired directly into permanent departments; (b) that most members of the class earned substantially and consistently less than their white male permanent department counterparts of like hire dates; (c) that class members were effectively excluded from the higher paying jobs and were limited in promotional opprtunities and (d) that black and female applicants are as well qualified as white male applicants. In light of these findings, the proof required to establish a class member's prima facie entitlement to black pay will be determined under the following principles:

a. All persons who are membeers of the class as defined in number (3) above, with with the exception of those who have knowingly and voluntarily "opted out", shall be deemed eligible for back pay by way of the company's employment and payroll records; and

b. Counsel for plaintiffs may establish by use of employment and payroll records that each individual claimant's income was and/or is less than that of the average of those white males with the same or closest seniority date who were hired directly into fabrication (hereinafter "the white average"). Calculations of back pay shall be made on a yearly basis (or fraction thereof) and no deductions shall be made for any year's earnings in excess of the white average.

c. Each individual claimant may establish that he was not informed of positions in departments other than the GLS; not given descriptions of such jobs; not informed that the company assigns new hires without regard to race or sex and that if he had been soinformed he would have applied for permanent employment.

d. Each individual claimant who is shown to have met the requirements of 5(a) through (c) above shall also have met his or her burden of establishing a prima facie entitlement to back pay.

Guideline 6. Proof Required to Defeat or Limit Recovery:

a. Defendants may attempt to prove that any particular class member is not entitled to re-

covery of back pay by showing the following:[3/]

(i) He was informed, at the beginning of the employment interview, of positions currently available in each of the four departments; and

(ii) He was given a description of the jobs in each of the four departments; and

(iii) He was informed that the company assigns the hires new workers without reference to race or sex; and

(iv) Although he was informed of (i) through (iii) above that he made a free and voluntary decision to forego permanent employment opportunities or was not qualified for permanent employment by the same standards applied to white male employees, and therefore was not actually injured in an economic sense by any unlawful employment practices.

3/ See Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 (5th Cir. 1974); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 445; Hairston v. McLean Trucking Co., 520 F.2d 226, 232 (4th Cir. 1975); Patterson v. American Tobacco Co., ____ F.2d ____ (4th Cir. Feb. 23, 1976), Slip. op. at 25; and Franks v. Bowman Transportation Co., ____ U.S. ____ 46 U.S. Law Week 4356, 4363, Slip. op. at 23-24 (1976).

b. Any such proof shall be an affirmative defense by clear and convincing evidence.[4/]

Guideline 7. Elements of Back Pay Liability:

Any award of back pay to any claimant shall include compensation for all elements of financial loss, specifically:

(1) interest on all back pay amounts at the legal rate of interest compunded from the time when such income losses occurred until the time of payment; (2) retirement, disability, overtime and shift differentials, vacation and sick pay, insurance and profit sharing plan adjustments compensating for previous reductions due to reduced income; (3) an "inflation factor" on all awards to assure payment in "constant dollars," e.g., the same present value as the value of income previously lost due to past discrimination calculated according to U.S. Department of Labor average cost-of-living data.

Guideline 8. Procedure for Assertion of Back Pay Claims:

a. Plaintiffs will be allowed a reasonable period for discovery of evidence pertinent to the claims. To the extent practicable, this

discovery shall be conducted informally.

b. Following compeltion of discovery, plaintiffs shall perform the necessary calculations of back pay and front pay for each claim and shall file written assertions of all claims to be advanced on behalf of class members.

c. Defendants shall respond in wriring, stating with respect to each claimant for whom a claim is asserted, whether they contest the claim in whole or in part, to what extent (if any) they would be agreeable to resolution of the claim, and the basis for their contest of the claim.

d. If following responses to the claims by defendants further discovery is necessary, it shall be conducted and the parties shall again attempt informal resolution of all claims.

e. Only those claims which cannot be resolved between the parties shall be litigated.

Guideline 9. Notices to Class Members.

All notices sent to class members and stating that forms should be filled out shall also state that counsel for plaintiffs are available at designated times and places to help them understand and comply with the requirements.

Guideline 10. Hearing and Determination of Disupted Back Pay:

Following completion of the procedures outlined in No. 8 above, the parties shall jointly certify to the Court lists of all class members whose back pay claims have been resolved by agreement and whose claims are disupted. Evidentiary proceedings will be held to resolve the disputed claims.

Guideline 11. Calculation of Forward or "Front Pay":

Each member of the class who is determined by the procedures set forth above to be entitled to back pay, who is still employed by the company, and who has not attained his "rightful place"[5/] shall be paid in addition to his regular pay rate of per-hour or per-day period equivalent of his back pay share [6/] (hereinafter "adjusted rate")

5/ "rightful place" for purposes of back pay and front pay is defined as the current white average pay rate.

6/ "back pay share" is defined as the difference between a class member's current earnings (as of the date of the Decree) and the appropriate white average earnings, e.g., if a class member is earning $5.00 per hour and the white average is $5.25, the "adjusted rate" of the class member would also be $5.25.

until such time that he is placed in a job or is eligible for a job, which he refuses, that has a pay rate equal to the then existing white average. Each class member shall be given opportunities to accept or refuse at least two different positions before losing the "adjusted rate". Adequate records shall be kept of such vacancies and rejections.

Guideline 12. Costs, Expenses, Attorney's Fees and Allocation of Liability:

(a) Defendants shall pay to plaintiffs' counsel on a current basis, reasonable attorney's fees, expenses and costs of both the original liability proceedings and the back pay and injunctive relief proceedings.

(b) The defendants shall be made jointly and seerally liable for costs, expenses, attorney's fees and the judgment for back pay in favor of class members. The resolution of any claims for indemnification between various defendants shall not preclude or delay the entry of the judgment of, nor the payments for, back pay liability.

Injunctive Relief Guidelines
Guideline 1. Present Posture of Case:

The language used in number one (1) of the Back Pay guidelines is incorporated by reference herein with respect to injunctive relief.

Guideline 2. The Period of Limitations on Seniority Adjustment:

Class members who were employed in the GLS on or after July 2, 1965 who are now or will in the future be employed in permanent departments and who meet all of the eligibility requirements for back pay (with the exception of earning less than the white average) shall be awarded retroactive seniority in such permanent departments for the time spent in the GLS.

Guideline 3. Definition of "Retroactive" Seniority:

In calculating retroactive seniority for class members, such seniority shall include time lost during the GLS off season unless defendants show by clear and convincing evidence that an individual was offered an opportunity to work in the off season and freely and voluntarily

declined it. The fact that there may have been less available vacancies than qualified class members to fill them shall not be a defense.

Guideline 4. Stemmery Transfer Policies:

Defendants shall not limit or restrict the number of seasonal employees who may transfer to permanent employment at the end of each GLS season.

Guideline 5. Future Hiring:

Defendants shall develop written job descriptions for all entry level jobs in all departments which shall be given to all applicants. These shall include objective criteria for selection of new hires. Applicants shall also be given the hourly rates of each job. Hiring of applicants for hourly jobs both permanent and seasonal shall be conducted at each employment office; all applicants shall be advised of all hires without regard to race or sex. The company shall keep applications active and on file for a period of no less than one year.

Guideline 6. Proof Required to Defeat or Limit Injunctive Relief:

Defendants may attempt to prove that any particular class member is not entitled to senior-

ity relief by the same type of evidence required to defeat or limit back pay, and in the same manner as required in No. 6 of the back pay guidelines. The failure of any class member to seek or accept a transfer from GLS to a permanent department shall not be a defense.

Guideline 7. Record Keeping an Reporting:

Defendants shall submit a report to the Court with copies to plaintiffs' counsel, annually, beginning one year from the date of the Decree, and thereafter for the next two years, showing the percentage of new hires by race and sex for each department, the percentage of the total hourly work force composition and each hourly job classifiction composition, by race and sex, for each department location; and the current location by job and department of each GLS employee who transferred within the one year period.

Guideline 8. Attorneys' Fees and Expenses:

Defendants shall pay to counsel for plaintiffs all attorney's fees, expenses, and costs of the original proceedings on liability. For the second stage proceedings, plaintiffs' counsel

shall submit quarterly statements of attorney's fees expenses, and costs, to be paid within 20 days after receipt by defendants.

So Ordered.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISON

Civ. A. No. 73-0488-R.

November 17, 1976

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NORA LEWIS, et al.,

Plaintiffs

- vs -

PHILIP MORRIS, INC., et al.,

Defendants.

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O R D E R

Deeming it proper so to do, it is ADJUDGED AND ORDERED that this Court's Order of September 2, 1976 adopting guidelines for back pay and injunctive relief be, and the same is hereby, vacated.

The guidelines for back pay and injunctive relief will be further considered by the Court, if necessary, at the conclusion of the plaintiffs' present appellate action.

Let the Clerk send copies of this Order to all counsel of record, as well as copies of the Court's Order filed October 12, 1976.

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United States District Judge

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 76-1998-1999
76-2199

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NORA LEWIS, et al.,

Appellees,

- vs -

PHILIP MORRIS, INCORPORATED, et al.,

Appellants.

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On Appeal From The United States District Court,
Eastern District of Virginia, Richmond Division

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Before Russell, Widener, and Hall, Circuit Judges.

Widener, C.J.: Philip Morris, Inc., the Tobacco Workers International Union, and Local No. 25 of the Tobacco Workers International Union appeal from a judgment finding them liable for a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq.

This suit is a class action[1] brought by five black employees of Philip Morris. It is the second such suit in recent years, repeating many of the assertions made in Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968). The plaintiffs' claim involves the allegation that the company, through discriminatory initial job assignment policies, segregates workers into black and white departments.

There are four departments[2] at the Philip Morris plant in Richmond, Virginia, three of which have permanent jobs, while at the remaining department the work is seasonal. The most attractive and skilled jobs, providing the best pay and the brightest opportunities for advancement, are in the fabrication department, where cigarettes are actually manufactured. Employees in fabrica-

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1/ The class consists of the named plaintiffs and all female and black male employees, whether currently employed or no longer employed for any reason, who were employees of the defendant Philip Morris' Green Leaf Stemmery on or after July 2, 1965.

2/ We speak of four departments throughout this opinion merely for convenience. Actually, the fourth department, the stemmery, is a separate plant and is not an integral part of the manufacturing process at the Richmond, Virginia cigarette plant.

tion are 41.1% black. The prefabrication department, second ranked in pay and desirability and which involves largely unskilled and considerable heavy labor, is where the bulk tobacco is processed into cut filler for use in the manufacturing of cigarettes. Its employees are 85.2% black. WSR, the warehouse department, third ranked in pay and which also involved heavy labor, largely unskilled, has 27.8% black employees. All of these three departments have permanent, as opposed to seasonal, jobs. The fourth department is the stemmery. It is the lowest paying department, almost wholly unskilled, and employment is seasonal rather than permanent. and it has 95.4% black employees.

The seasonal work is in the stemmery, where the curent crop of tobacco is processed for aging and storage. Historically, the stemmery has been predominantly black, and it remains so. The gravamen of the plaintiffs' complaint is that the company and the unions purposely assigned black employees to the stemmery, which was the most unfavorable department in the company's operation.[3/]

3/ Before trial, the plaintiffs and Philip Morris stipulated that the following were the only issues to be tried:

The court, although finding a violation of Title VII for another reason, was unable to find that "the excessive assignment of blacks to the stemmery was purposefully undertaken by the company to covertly continue its historical system of segregated departments." Additionally, the court absolved the unions of any charges that they violated their duty of fair representation.

However, in spite of the absence of purposeful discrimination by the company or the lack of fair representation by the unions, the district court found the black employees believed that

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3/ Cont'd.

"(1) whether the members of the class were hired into the stemmery rather than into permanent employment as a result of racial or sexual discrimination;
(2) whether the transfer, promotion, seniority, initial job assignmens and wage rate policies discriminated against class members on the basis of race, and sex, except in the selection of supervisory personnel;
(3) if discrimination in any of the foregoing were found, whether injunctive relief is appropriate and what amount of back pay, if any, should be awarded class members;
(4) what costs, expenses and attorneys' fees should be awarded."

the company discriminated against members of their race in the assignment of jobs. Therefore, it held that the company was liable because it did not inform "all applicants for hourly positions at the beginning of any interview (1) of the positions currently available in each of the four departments with an appropriate job description, and (2) that it assigns and hires new workers without reference to race."4/ Accordingly, it

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3/ Cont'd.

The plaintiffs charged the unions with complicity in alleged purposeful discrimination and with a violation of their duty of fair representation as imposed by federal labor law.

4/ The folllowing finding from the memorandum opinion is significant.

> "The Court is unable to find, however, on the basis of the record before it that the excessive assignment of blacks to the stemmery was purposefully undertaken by the company to covertly continue its historical system of segregated departments. What has been established is that the Company, although liberally proclaiming that it assigns new hires without regard to their race, has unfortumately done nothing to dispel the belief, founded on its past acts of discrimination, and held by a substantial number of black applicants that it still assigns to

ordered recovery of damages to class members who were not so advised and "believed that their race substantially limited their initial employment."

We are of opinion that the district court erred in giving relief to certain members of the plaintiff class through the formulation of a duty which Title VII does not require.

4/ Cont'd

departments new hires on the basis of race. Such a belief has translated itself into a set of circumstances that has continued to place blacks at a disadvantage when seeking employment at Philip Morris. The Company's professed neutrality is, in fact, not neutral, for past acts of discrimination continue to significantly affect modern practice. 'Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.' Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971), see also Quarles v. Philip Morris, Inc., supra. The Company, in order to reassert a balance, should have informed all applicants for hourly positions at the beginning of any interview (1) of the positions currently available in each of the four departments with an appropriate job description, and (2) that it assigns and hires new workers without reference to race.

1. Initially, we dispose of a procedural point raised by the appellees, who have moved for dismissal of this appeal on the ground that the order appealed from is not final order granting relief, citing Liberty Mutual v. Wetzel, 424 U.S. 737 (1976). That order, entered on September 2, 1976[5/] adopted to the letter the plaintiffs' proposed guidelines for relief. While the guidelines consist in part of additional findings of fact and conclusions of law, they require the defendants, among other things, to supply a list

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4/ Cont'd.

> All those class members that were not so informed when they were hired into the stemmery, and that believed that their race substantially limited their initial employment to the stemmery are entitled to recover for their losses."

5/ The parties do not contest that an earlier July 7, 1976 order is not an appealable order. That order merely found for the plaintiffs on the issue of liability, and did not require the defendants to take any action. It only required "counsel" to "forward to the court ... suggested procedure appropriate to facilitate an award of relief pursuant to the memorandum filed herein." For a similar order, see Liberty Mutual.

of all members of the class eligible for back pay, to pay interim attorneys' fees, to develop job descriptions, not to limit transfer of employees from the stemmery at season's end, to hire both permanent and seasonal employees at each employment office, to advise all employees of all vacancies, and to keep applications active and on file for a period of no less than one year.

In determining whether an order is or is not an injunction, we look to the substance, rather than the form, of an order. Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942). We believe the guidelines, requiring the defendants to act in some instances and forbidding them to act in others, to be an injunction.[6/] We do

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6/ A further indication that the district court understood its own order to require immediate actions of the defendants is that, on October 12, 1976, the court granted a stay of the order pending appeal. Had the order not contemplated present acts from, or restraint on, the defendants, such a stay would have been superfluous. Moreover, in opposing the stay, the plaintiffs at that time took the position that the order placed present requirements on the defendants and argued that the equity of relieving them of the burden of complying with the order during the pendency of the appeal.

not agree with the plaintiffs' position that the guidelines, although requiring present affirmative action or restraint, are yet unappealable. Nor does it gain support from Liberty Mutual, supra, for there the court merely had found a violation of the act and had not ordered the defendants to take, or, refrain from, any action or to pay attorneys' fees. See 424 U.S. at 742.

But the plaintiffs say, assuming the law to be as we have just recited, the appeal must nevertheless be dismissed because the district court, by order of November 17, 1976, vacated the order of September 2, 1976 from which this appeal has been taken. While the district court did attempt, through the order of November 17, 1976, to vacate the order appealed from, it had no power, after the notices of appeal were filed, to enter such an order. In this, the plaintiffs are not aided by the power given to the district court through FRCP 62(c) which only applies to allow the district court to make provision for the "security of the rights of the adverse party." Although the proceedings in the district court are not stayed by an application for an interlocutory

appeal under 28 U.S.C. §1292(b), this is an appeal from the granting of an injunction under §1292(a), and the district court lost its power to vacate the order when the notices of appeal were filed. In this sense, this case is similar to Zimmer v. McKeithen, 467 F.2d 1382 (5th Cir. 1973), where, after the notice of appeal from a reapportionment order was filed, the district court attempted to change the order to encompass an alternative apportionment plan. A panel of the Fifth Circuit refused to consider the latter order, calling it a nullity. The panel decision was reversed on its treatment of the merits of the district court's first order by an en banc court, 485 F.2d 1297 (5th Cir. 1973), and the en banc court was affirmed by the Supreme Court, which also examined only the original order for the district court, noting without criticism the panel's refusal to consider the second order. Opinion styled East Carroll Parrish School Board v. Marshall, 424 U.S. 636, at p. 638, n.4 (1976). Significantly, the en banc court, as affirmed by the Supreme Court, reversed the district court, a result which might have been obviated by the consideration of the second order, which would have replaced the

offensive elements of the first order. Hence, we believe the Supreme Court has at least tacitly acknowledged that a district court loses jurisdiction to amend or vacate its order after the notice of appeal has been filed, which we hold. See also Sumida v. Yumen, 409 F.2d 654 (9th Cir. 1969), cert. den., 404 U.S. 964, reh. den., 405 U.S 1048 (1972); Aune v. Reynders, 344 F.2d 835 (10th Cir. 1965); Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2d Cir. 1962); District 65, Distributive, Processing and Office Workers Union v. McKague, 216 F.2d 153 (3d Cir. 1954); Miller v. United States, 114 F.2d 267 (7th Cir. 1940).

II. As noted above, this case is an extension of, or the same, controversy decided ten years ago. In the district court in that case, Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968), two black employees brought a suit on behalf of all black employees of Philip Morris, alleging "that the defendants by their employment practices and collective bargaining agreement refused to hire, promote to supervisory positions, pay, advance and transfer Negro employ-

ees on the same basis as white employees." 279 F.Supp. at 507.

While finding that the company had discriminated against two Negroes with respect to pay and against the named plaintiff Quarles and the Negroes hired in the prefabrication department before January 1, 1966 with respect to advancement, transfer, and seniority, the Quarles court expressly found that Philip Morris had not engaged in discriminatory hiring practices since January 1, 1966 and that the company's policy for assignment of workers to the stemmery did not violate Title VII.[7/] Because of the similarity of the

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7/ The findings of the court included:

"I. The company has not engaged in discriminatory hiring practices since January 1, 1966, and consequently, the plaintiffs are not entitled to relief on this issue.

"II. The company has not discriminated on racial grounds with respect to employment and promotion of supervsiory personnel.

"III. The company has discriminated on grounds of race with respect to the pay of two employees, Ephriam Briggs and Mrs. Lillie J. Oatney; the plaintiffs have failed to establish discrimination against Negroes with respect to pay.

"IV. The defendants have discriminated against Douglas R. Quarles and the class consisting of Newgro employees who were hired in the

contentions presented in Quarles with those made in the present case, the inclusion of the present seasonal class members (black stemmery employees) in the Quarles class (all black employees), and the actual membership in the Quarles class by two of this suit's named plaintiffs who were employed by Philip Morris at the time of the Quarles judgment, the defendants have contended at all stages of this litigation that the doctrines of res judicata and stare decisis should apply to the present controversy.

The court below rcognized that the application of res judicata, or even stare decisis, would be highly damaging to the plaintiffs' case; the vindication, in 1968, of the company's hiring practices and stemmery assignment practices would bind, insofar as the court found that, up the time of the 1968 judgment, the hiring practices were not racially motivated, the black female plain-

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7/ Cont'd.

prefabrication department before January 1, 1966, with respect to advancement, transfer, and seniority. The plaintiffs are entitled to relief correcting this discrimination." 279 F.Supp. at p.507.

tiffs and the black male plaintiffs on the question of racial discrimination. The district court refused to implement res judicata on the ground that the members of the Quarles class could not be constitutionally bound by that decision because the class members had not been notified of the pendency of the suit.[8/]

Thus, a decision as to the applicability of the rule of res judicata would necessarily require a determination of the constitutionality, facially or as applied, of the provision in FRCP 23 making a judgment binding on a member of a FRCP 23(b)(2) class regardless of whether the individual was notified of the suit. Because we are of opinion the district court's judgment should be reversed on grounds independent of the binding effect of the Quarles judgment, we decline to consider that issue. Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

III. We now turn to the merits of the appeal. The issues in the litigation, agreed

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8/ The district court also stated that it believed the interests of the stemmery workers were not adequately represented in the Quarles action.

to prior to trial by the plaintiffs and the company, are (1) whether the members of the class were hired into the stemmery rather than into permanent employment as a result of racial or sexual discrimination, and (2) whether the transfer, promotion, seniority, initial job assighment, and wage rate policies discriminate against class members on the basis of race or sex, except in the selection of supervisory and craft personnel. All claims for affirmative relief on the basis of alleged discriminatory working or disciplinary conditions were withdrawn by the plaintiffs.

In its opinion, the district court found that the excessive assignment of black employees to the stemmery was not motivated by a racially discriminatory animus. It made no finding that female employees were assigned to the stemmery because of their sex. Additionally, the court found that the provisions of the collective bargaining agreement governing transfer, promotion, and seniority were nondiscriminatory and would not have to be changed, but that discrimination existed in transfer, promotion, and seniority because of initial assignment, as we discuss later.

With these and other holdings later mentioned the district court held both the company and the unions to liability. While the opinion is not clear on the precise grounds on which it rests, it can only be on one of two. First, that the company and the unions had "unfortunately done nothing to dispel the belief, founded on . . . [the company's] past acts of discrimination, and held by a substantial number of black applicants that it still assigns to departments new hires on the basis of race." Second, that the company "in order to reassert a balance, should have informed all applicants for hourly positions at the beginning of any interview (1) of the positions currently available in each of the four departments with an appropriate job description, and (2) that it assigns and hires new workers without reference to race."

A. So far as the opinion of the court below may be said to have been based on the defendants' failure "to reassert a balance" in its work force, the district court erred in its interpretation of the demands of Title

VII. Title VII does not require a racially balanced work force, for such a conclusion is, in the words of the Supreme Court, an "erroneous theory." Teamsters v. United States, 431 U.S. 324, 339-40, n.20 (1977). Moreover, the problem is explicitly dealt with by the statute.

Section 703(j) of the Act, 42 U.S.C. §2000e-2(j), makes clear that employer liability may not be based solely on the existence of a racial imbalance among employees, when the district court had found the absence of purposeful discrimination. As explained by Senator Humphrey, the purpose of this provision is to indicate the absence from the statute of any required racial balance:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group.

Legislative History of Title VII and IX of the Civil Rights Act of 1964, Equal Employment Opportunity Commission, Superintendent of Docu-

ments, p. 3005. Thus, §703(j)[9/] forbids court ordered preferential treatment designed solely to achieve a racial balance, as well as the formulation of liability based merely on the lack of racial balance.[10/] As far as the opinion of the court below founded liability solely on the company's failure to "reassert a racial balance," even though the defendants were not presently discriminating, it is in error.

9/ 42 U.S.C. §2000e-2(j) provides in part:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or any group because of race . . . [or] sex . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . [or] sex . . . employed by an employer. . . ."

10/ We are not unmindful that the existence of a racially unbalanced work force might support an inference of purposeful discrimination. See Teamsters , 340, n.20. In the face of the district court's finding that the defendant did not purposefully discriminate against black emloyees, that inference should not be drawn.

B. The analysis of the second ground of the district court's decision is not so brief but leads to the same conclusion.

The district court considered statistical evidence that from 1965 to 1974 63% of all black employees hired were either assigned to the stemmery or prefabrication, while, during the same period, only 18.2% of the white employees were so assigned to these two departments. 50% of the black employees initially hired during the period went into the stemmery, compared to 11.5% of the white employees hired in the same period. During those years, an average of 79.5% of the employees hired into the stemmery were black, and the average percengage of black employees in the stemmery work force was 84.3%. The average percentage of black people in the Richmond work force during that period was about 24%. The court considered that the company had previously maintained segregated departments until the early 1960s and was of opinion the plaintiffs had made out a prima facie case. It appeared however that in fabrication, the most desirable department in the company, the respective numbers of black and

white employees was not diffeent enough from the make-up of the work force in the area to draw any inference of discrimination therefrom, and the same applied to the warehouse, the third most desirable department. In prefabrication, the second most desirable department, black employees predominated. It also appeared that, commencing in 1971, seasonal employment was conducted on separate days or at separate locations, and for the two years immediately past only 5.3% of the applicants for seasonal employment were white. The hiring of black and white employees into the stemmery during those past two years was proportional to the applications received.

The district court concluded that it was "unable to find" "that the excessive assignment of blacks to the stemmery was purposefully undertaken by the company to covertly continue its historical system of segregated departments." Considering that Teamsters has made it clear that statistical analysis serves as important role in cases concerning employment discrimination and statistics are competent proof of such, but that, like any other kind of evidence, their usefulness depends

on all the surronding facts and circumstances, the statement of the Court that statistics showing racial or ethnic imbalance were probative in that case "only because such imbalance was often a telltale sign of purposeful discrimination," Teamsters, n.20, is consistent with the ruling of the district court here that, despite the prima facie statistical case, purposeful discrimination was not shown. It is thus clear that, although the district court considered whether or not to base its finding on a prima facie statistical case, it decided not to, rather finding that the statistical case did not support the conclusion of purposeful discrimination.

Instead, the district court found that "the answer in the court's view lies in the testimony of the plaintiff's witness that 'if you want to get hired you know being black your best chance would be to go through the stemmery and then transfer to permenent employment later.'" The reasoning behind this statement by the district court was reiterated in various ways throughout the opinion. For example, it provided for recovery for those class members who were not

informed by the company when they were hired that the company did not discriminate and about all job openings, and "that believed that their race substantially limited their initial employment to the stemmery." It further stated that it had "concluded that class members are often lead to seek employment in the stemmery on the basis of past racial discrimination." It found that th collective bargaining contract provisions concerning seniority, transfer, and promotion did not have to be changed, and like the Quarles court, it found seasonal employees to be poorer workers on the whole who had to prove themselves before given the rights and benefits of permanent employees.

We do not think a failure of the company to announce innocence is a violation of Title VII. Neither do we think the failure of the company to advise black applicants for stemmery jobs of promotions available in the other departments is a violation of Title VII, when the company treated all applicants, black and white, the same. This is especially true when we consider that the first and third departments in order of desirability were not even found by

the district court to be statistically racially imperfect in make-up or hiring, and, in the second most desirable department of the company, black employees predominated both in numbers and in hirings.

Nor is it permissible to base recovery on the subjective belief of class members "that their race substantially limited their initial employment to the Stemmery." Basing recovery on that fact is an improper consideration. The question is whether or not the company did in fact discriminate, not whether or not the employee did in fact believe the company had discriminated. It is at once apparent that the consideration of these two questions is entirely different.[11/]

The district court found that the company's history of segregated departments and the continued dominance of black employees in the stemmery and prefabrication departments had led a substantial number of black applicants for employment to understand that their most likely opportunuty for employment would be in the stemmery.

The court made this finding on the testimony of one witness, a black female. She had applied for work in the fabricating department, had been turned down, and a short while later applied for work in the stemmery and was accepted. It was she who testified that if a black applicant wanted to get hired his best chance would be to go through the stemmery and then transfer to permanent employment later. She had down just this.

Basing its entire holding on the testimony of this witness is error for two reasons.

First. The witness herself had not been discouraged from application for work in the fabrication, for she had in fact applied, so the acts of the witness as opposed to her testimony could not cause a negative inference to be taken against the company to prove the point the court wanted to make; that black applicants believed they would not be hired into the permanent departmernts so they applied to the stemmery instead of for permanent employment. Not only the district court fail to find discrimination in hiring in the fabrication department, as might be logical from the testimony, not a signal other

witness testified that he had been discouraged by belief or otherwise from applying for work in one of the permanent departments, so the testimony of the one witness stands alone, and her own acts belie her words. Second, and equally as important, in the years from 1965 through 1974, there was a total of 3388 black employees hired into permanent departments. This number itself is telling evidence that none of them were discouraged from applying for work in the permanent departments. Also during those years there were 3484 black employees hired into the stemmery. Not one of them testified that he had been discouraged from seeking employment in one of the permanent departments, nor that he even had the belief that he would have been accorded equal consideration had he made application. Accordingly, we are of opinion that on the record before us this finding of fact by the district court is clearly erroneous. FRCP 52(a).

At this point we should say that, had either the doctrines of res judicata or stare decisis been applied, those parts of this opinion discussing racial discrimination in hiring into the

stemmery would have been inappropriate, or at least largely so, for the plaintiffs would have been bound by the earlier decision in Quarles. We have so held in a case indistinguishable on its facts, Griggs v. Duke Power Co., 515 F.2d 86 (4th Cir. 1975), and the district court recognized this in its opinion as it recited (obviously referring to the situaion at hand) that the plaintiffs were litigating "in the face of a seemingly valid judgment directly on the matter in controversy." (Italics are the district court's) Even considering that our characterization just above of the import of the district court's language may be incorrect, in Quarles the court held, on page 508, that ". . . since January 1, 1966, the company had not discriminated on the grounds of race in its hiring policy. The court concludes, regardless of practices before January 1, 1966, relief on this issue is not now appripriate." This finding adverse to the plaintiffs was not appealed.[12/] In

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12/ The Quarles order provides in its first paragraph:

1. The plaintiffs' prayer for an injunction requiring Philip Morris, Inc., to modify its current hiring practices is denied.

the case before us now, the plaintiffs obviously realized that this holding in Quarles had to be circumvented in some way or other, and the decision of the district court that the Quarles plaintiffs did not properly represent the class and that the application of FRCP 23(b)(2) to the Quarles class plaintiffs was in violation of the Fourteenth Amendment (obviously meaning the Fifth Amendment) is the result. This undoubtedly accounts for the failure of the plaintiffs to try the present case on the theory that discrimination took place after the judgment of the district court in Quarles and to attempt to prove any such discrimination as a separate item from any discrimination which may have taken place before that judgment. See Griggs, p. 88. While an examination of the statistical evidence before and after the judgment in Quarles may not seem to disclose any differences of significant advantage to the plaintiffs, this case has neither been tried nor appealed on that ground. Believing that we should not unnecessarily approach the question of the constitutional validity, facially or in application, of FRCP 23(b)(2), see Wright on

Federal Courts, 3d Ed. §72, to these class plaintiffs, since the case may be decided on another ground, we expressly do not intimate any opinion as to the correctness of the holdings of the district court in that respect and also in respect to the matter of the class being inadequately represented in the Quarles case. The same reservation applies to the ruling of the district court refusing to apply stare diecisis.

Accordingly, we are of opinion that those parts of the complaint alleging discrimination by the company based on race should be dismissed.

C. The district court held the unions to liability on much the same theory it held the company.

It found the unions had had a "checkered past," for until 1963 the local unions were segregated. The court found that their past indicated they had facilitated the company's traditon of segregated departments and that they should share the company's responsibility for informing their "members that all jobs are open in all departments without regard to race or sex so as to mollify members' present understandings as

based on past history." Their "failure to perform this function makes ...[them] jointly liable with the company to those plaintiffs entitled to recover."

The only thing in the record which would justify the court's finding of members' present understanding based on past history was the testimony of the black female witness we have above referred to and the finding based on it which we held to be clearly erroneous. Applying this finding to the unions is even more tenuous than to the company because the unions had nothing to do with hiring.

Because no member's present understanding has been proved in this case, finding such a present understanding is clearly erroneous. FCRP 52(a).13/

We are thus of opinion those parts of the complaint alleging discrimination by the unions based on race should be dismissed.

13/ We do not intimate that the district court's theory of holding the unions to liability is correct. It is simply not necessary for us to address the point.

D. The case of the class plaintiffs claiming discrimination on account of their female sex is different from that of the class plaintiffs claiming discrimination based on race.

Referring back, the agreed issues to be tried in this context were (1) whether women were hired into the stemmery on account of their sex, and (2) whether the transfer, promotion, seniority, intial job assignment, and wage rate policies discriminated against them on the basis of sex. All claims for affirmative relief sought on the basis of aleged discriminatory working or disciplinary conditions were withdrawn by the plaitiffs.

The court recited evidence and may have found that the company did not discriminate with respect to pay between the various job clssifications with respect to race or sex. As previously recited, it found that the seniority, transfer, and promotional rules did not have to be changed. But it found that "[i]t is the initial assignment policies that taint the system," and hold that seniority, transfer, and pormotional restrictions of seasonal employees were discriminatory, although the holding did "not require a redrafting

of those provisions." What we make of these seemingly contradictory rulings is that if an intial discriminatory assignment affected later rights, the empoloyee might recover.

Remarkably, the district court did not make any finding as to whether or not women employees were assigned to the stemmery because of their sex, although we should have thought this was the principal issue in the case. Perhaps the reason was that its examination of the evidence agrees with our own admittedly brief consideration of some of the statistical evidence which shows that about the same percentage of women were hired into the stemmery as into permanent emplyment. 27.6% of the stemmery initial hires were female, while 25.3% of the employees whose initial hiring was into permanent departments were female.

Since we will not assume that sexual discrimination existed by reason of initial assignment to the stemmery, the principal issue left open, and upon which the whole case largely depends, is whether, upon hiring, the initial assignments of female employees to jobs, whether within the

stemmery or within a permanent department,[14] were discriminatory on account of sex.

The district court recited that the plaintiffs produced evidence that several job classifications within various departments were predominantly male or female. It found that in the stemmery female jobs have been in the light category, while male jobs have been in the heavy category, and that certain higher order or key jobs were sexually sterotyped. It recited the plaintiffs' claim that the company maintains male and female job classificatins within both the stemmery and the permanent departments. It found that there are female tag meter operators, male lin-out and press operators, and forklift operators, and a predominantly male skeleton crew that works during the shutdown period of the stemmery. It found that the prefabrication department maintained light labor and heavy labor classifications and that in the fabrication department the

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14/ The record suggests very few initial hires into permanent departments were later employed in the stemmery.

jobs of head-fixer and fixer are male, while the jobs of catcher, attendant, examiner, and inspector are female. It also found that there has never been a female transfer from the stemmery to the warehouse, but apparently did not attach any significance to the fact there has only been one female hired directly into the warehouse. How or why such classifications were discriminatory the district court did not say.

The plaintiffs point out, in addition, that in one instance there was evidence which tended to show that the company discouraged a female employee from transferring to a job as forklift operator.

The company insists that there was no evidence that any class member ever aplied for and was denied promotion to any job which her seniority would have entitled her to hold. It also insists that where was no evidence that in any significant number of cases, females applied for jobs but were turned down in favor of junior maeles. It points out that in one particular job classification, which the district court had categorized as female, more than 100 female

employees junior to those in that classification had bid for and been accepted in jobs paying more than those of the categorized classification without a bid by those within the classification, which evidence tends to indicate, of course, that any categorization of the job as female had nothing to do with the company, rather with the employee's preference, about which the company could no nothing. The company further insists, without reply, that from 1966 until 1974 transfers were governed by a job prefrence system and from 1974 on by job posting and bidding, and that no nefarious operation of either system by the company or the union has been pleaded or proved. The district court did not address these matters.

The district court made few, if any, statistical findings with respect to sexual discrimination. It did not discuss the theory that an employee who had sought a job by preference was not discriminated against by the company. Much in the same manner as it approached the question of race discrimination, it found that it was "the duty and the burden of the defendants to inform all potential applicants for the various openings

for said openings as they develop, and that these openings would be filled withour regard to sex.... "It held that "those applicants in the class that were not so informed and would have applied for any such openings if informed are entitled to recoer."

We have not attempted here any detailed analysis of the evidence with respect to sexual discrimination principally because the district court attempted none. If the district court's findings and recitals are true, there may well be a case of sexual discrimination. On the other hand, if the company's contentions, which it maintains are unrefuted, are true, there may well not be.

We are of opinion that this is a case in which "the findings of fact, on which the judgment was granted, were phrased in broad conclusory terms and did not include any subsidiary findings which would give appropriate support to the court's conclusory findings." United States v. Commonwealth of Virginia No. 77-1683, 569 F.2d 1300 (4th Cir. 1978). As in EEOC v. United Virginia Bank-Seaboard National, 555 F.2d 403 (4th

Cir. 1977), the court made no analysis of the statistical information or the weight to be accorded it under the facts advanced by the defendants. There is here as there as absence of an critical review of the relevant facts culminating in a coherent body of factual findings which is particularly called for in a discrimination case. For example, the company insists that upon employment into the stemmery female employees were advised of the heavy labor and light labor categories, and the wages therefor, and given a chance to indicate a preference for each. This is not taken account of by the district court, as was not, as previously recited, the fact that for a great number of years the company had apparently operated its transfer system either by maintenance of a job perference file or by job posting and bidding. The mere fact that a company or a union may have discriminated on account of sex before the Civil Rights Act is not enough upon which to base a finding of liability if present discrimination is not shown, see Hazelwood School District v. United States, 433 U.S 299 (1977), and

as with the matter of racial discrimination, the failure to proclaim innocence is no ground to base liability upon.

While it may be thought from what we have said that the failure of the district court to make the key findings of whether or not women were hired into the stemmery because of their sex, and whether their intial job assignments upon hiring were discriminatory on account of sex, would lead to a dismissal of claims of the class for failure of proof, we do not believe that is a proper disposition of the case. There is enough in the conclusory findings of the disgrict court to create a legitimate doubt as to whether or not discrimination on account of sex existed under the issues which were agreed to be tried. See Dothard v. Rawlinson, 433 U.S. 321 (1977).

Accordingly, the judgment of the district court with respect to sexual discrimination is vacated and remanded for consideration by the district court. On remand, the district court may consider the record before it, and may, within its discretion, take additional evidence if it be so advised.

SUMMARY

The judgment of the district court is vacated, and the case is remanded.

On remand, the district court will dismiss the allegations of the complaint based on employment discrimination on account of race; those allegations of the complaint based on sexual discrimination will be the subject of reconsideration not inconsistent with this opinion.

While the opinion of the district court found for the unions on the issue of whether they had fairly represented their members, see 29 U.S.C. §195(a), no order has been entered giving effect to that part of the opinion. We presume an order with respect to this issue will be entered on remand.

Following reconsideration of the case, the district court will reconsider its award of attorney's fees.

Vacated and Remanded.

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 76-1998-1999
76-2199

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NORA LEWIS, et al.,

Appellees,

- vs -

PHILIP MORRIS, INCORPORATED, et al.,

Appellants.

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O R D E R

No request for a poll of the court on the suggestion for rehearing en banc having been made, rehearing en banc shall be, and hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED, and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Russell and Judge Hall.

/s/H.E. Widener
For The Court

Filed: July 26, 1978